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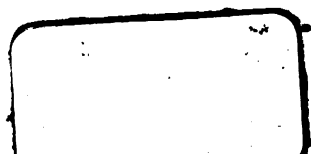
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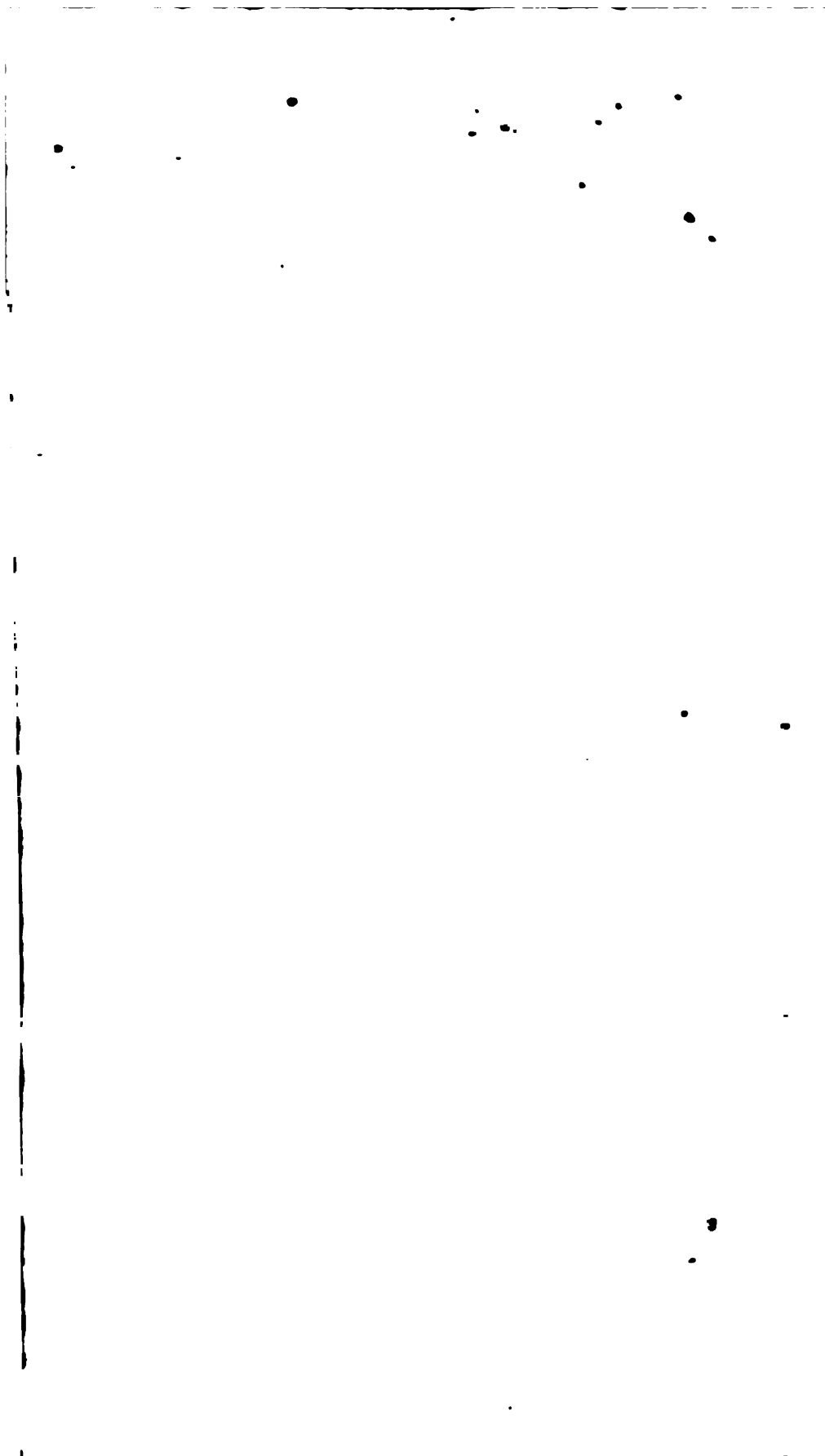
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**R E P O R T S**  
OF  
**C A S E S**  
**HEARD AND DETERMINED**  
BY  
**THE JUDICIAL COMMITTEE**  
AND  
**THE LORDS**  
OF  
**HER MAJESTY'S MOST HONOURABLE**  
**P R I V Y C O U N C I L .**

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**BY EDMUND F. MOORE, ESQ.,**  
**BARRISTER-AT-LAW.**

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**(NEW SERIES.) VOL. III.**

**1865-6.**



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1865-6.

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# CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL.

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ON APPEAL FROM THE ARCHES COURT  
OF CANTERBURY.

JOHN JONES - - - - - *Appellant,*

AND

EDWARD GOUGH AND OTHERS - - *Respondents.\**

THIS was an appeal from a decree of the Arches Court of *Canterbury* in a cause of substruction of Church-rate, promoted by the Respondents, *Edward Gough, John Cartwright, Robert Garden, and Richard Dodson*, Churchwardens of the Parish of *St. Mary*,

2nd Feb.  
1865.

Consolidated  
Chapelries  
and district  
Churches,  
though differ-  
ing in origin,  
are, when once  
formed, pre-  
cisely similar  
in character,

\* Present: Lord Cranworth, Lord Chelmsford, the Lord Justice Knight Bruce, and the Lord Justice Turner.

and within the meaning of the Statute, 19th & 20th *Vict.* c. 104, s. 14.

The voluntary relinquishment of fees required by the 12th section of the Statute, 19th & 20th *Vict.* c. 104, may be made without the execution of any written instrument.

A party is not bound to appeal from an interlocutory decree, though he might by so doing have raised the whole question at issue on the appeal from the definitive sentence.

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*Shrewsbury*, in the County of *Salop*, against the Appellant, a parishioner of that Parish, by virtue of Letters of Request from the Chancellor of the Diocese of *Litchfield*, to recover the sum of sixteen shillings and threepence, the amount of a Church-rate assessed against the Appellant at a Vestry meeting of the Parish held on the 22nd of *May*, 1861.

The libel, which, after being reformed by pleading how and at what dates respectively *St. Michael*, *Leaton*, *Astley*, *Clive*, and *Albrighton* became distinct and separate Parishes for Ecclesiastical purposes in manner hereinafter stated, pleaded, amongst other things ; “ that the Churchwardens of the Parish of *St. Mary*, *Shrewsbury*, exclusive of the aforesaid districts of *St. Michael*, *Leaton*, *Astley*, *Clive*, and *Albrighton*, being in want of funds, did, on the 19th of *May*, 1861, cause a notice to be fixed on the doors of *St. Mary’s* Church and of *Berwick* Chapel within that parish, that a meeting of the inhabitants of the parish in Vestry would be held in the vestry-room of the Parish Church to grant a Church-rate towards the repairs and other expenses of the Church for the year 1861–1862 ; that, in pursuance of such notice, a rate of threepence in the pound was duly made on all properties and persons rateable in the said Parish, except the several districts aforesaid, for and towards the purport and object of the notice aforesaid ; that, at the time of making such rate, the Appellant occupied premises in the Parish for which he was rightly and equally rated at the sum above stated ; that, though several times requested to pay the rate, and finally summoned before the Magistrates for refusing to pay, he so refused, distinctly on the ground of the illegality of the

rate, in consequence whereof the Magistrates declined to proceed for the recovery thereof. The libel then set forth the reformed article, which was in the following form; "that *St. Michael, Leaton, Astley, Clive, and Albrighton*, mentioned in the first article of the libel, had each one a district assigned to it, with power to each Incumbent thereof respectively to publish banns of matrimony, to solemnize marriages, churchings, baptisms, and burials, and also to receive for his own use and benefit the entire fees arising from the performance of the said offices without any reservation thereout, and which said powers each of such Incumbents exercised; that in consequence thereof each of the districts became, by virtue and operation of the Act of Parliament, entitled 'The New Parishes Act of 1856' 19th & 20th *Vict.* c. 104, secs. 14 & 15, and was a separate and distinct Parish for all Ecclesiastical purposes, and was not liable for the repairs or other expenses of *St. Mary, Shrewsbury*, the mother Church, on and after the 29th of *July*, 1856, in virtue of two previous Orders of Her Majesty in Council, published respectively in the *London Gazette*, the 28th of *May*, 1852, and the 19th of *May*, 1854; and *Leaton, Astley, Clive, and Albrighton*, in virtue of an Order of Her Majesty in Council, published in the *London Gazette*, in each case respectively bearing date, as to *Leaton*, on the 31st of *March*, 1860, as to *Astley*, on the 28th of *August*, 1860, and as to *Clive* and *Albrighton*, on the 30th of *October*, 1860. And that all the fees aforesaid in respect of *Leaton* were voluntarily relinquished to the Incumbent thereof immediately after its consolidated chapelry was formed, to wit, on the 31st of *March*, 1860."

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The Appellant by his answer stated his inability of his own knowledge, to answer the averments of the Churchwardens of their want of funds, or of their having given due notice of the Vestry meeting, but admitted that a rate had been made by the parishioners in Vestry on all properties in the Parish, with the exceptions pleaded; he admitted that at the time of making the rate he occupied the premises in the parish as alleged in the libel, and for which, had the rate been legally made, he would have been rightly assessed; but he averred that he was totally unable to interpret the Orders in Council or the Acts of Parliament pleaded, and submitted the same to the judgment of the Court.

In an allegation brought in subsequently by him, after pleading several matters in detail, showing that the rate proceeded for was excessive, and, therefore, void, he admitted, with respect to the consolidated Chapelry of *Leaton*, that it was created as pleaded: he stated that it was composed of part of the Parish of *St. Mary, Shrewsbury*, part of the Parish of *Fitz*, and part of the Parish of *Preston Gubbald's*, all in the County of *Salop*, and averred that such consolidated Chapelry of *Leaton* had not, at or prior to the making of the rate in question, become a separate and distinct parish for Ecclesiastical purposes; and that such part thereof as was taken from the parish of *St. Mary, Shrewsbury*, contained property legally assessable to a Church-rate.

The Respondents took issue on the averment, and insisted that *Leaton* was a separate and distinct Parish.

The pleadings contained averments and allegations against the legality of the rate on the ground of its

being unnecessary and excessive, besides being invalid for not comprehending the district of *Leaton*. As, however, the latter ground was the principal point upon which the appeal was argued and determined, it is necessary only to state so much of the evidence as related to that issue.

Among the witnesses examined was the Reverend *T. B. Lloyd*, the Incumbent of *St. Mary's, Shrewsbury*, for which Parish the rate in question was made. He deposed that the rate in question had reference to that part of the Parish remaining within the district of the old Church, exclusive of the districts of *St. Michael, Leaton, Astley, Clive, and Albrighton*, which had each a distinct district assigned to it, with such powers to the respective Incumbents as in the libel pleaded; that all such districts were formed previous to his incumbency, with the exception of *Leaton*; and that on the formation of that district all the fees in respect of that portion of *Leaton* which was within his parish of *St. Mary* were voluntarily relinquished by him, as Incumbent of *St. Mary's*, to the Incumbent of *Leaton*. On his examination upon interrogatories, he stated that he was aware, when *Leaton* was made a consolidated Chapelry, that he was by law entitled, as Incumbent or Clerk of *St. Mary's*, to the fees for baptism, if any, and for banns, churchings, marriages, and burials performed by the Incumbent of such consolidated Chapelry in respect of persons resident in the part of the Chapelry which was taken from the parish of *St. Mary*, for his life; that the Incumbent of such consolidated Chapelry was bound by law to keep an account of the fees received by him for the performance of such offices,

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and every year to pay the same over to him as Incumbent of *St. Mary's*. He further deposed that he had not in writing relinquished his right to any such fees, but that prior to the district being formed, while they were making inquiries in reference to its formation, he had stated, in answer to inquiries addressed to the patron of the living by the Ecclesiastical Commissioners, that he had relinquished his title to such fees, and the Patron so filled it in, in his reply to the Commissioners, but that he had not otherwise in writing relinquished such his title. With respect to the district of *Leaton*, he said that it contained land and houses of considerable annual value, which were assessed to Church-rates made for the Parish of *St. Mary, Shrewsbury*, before the date when such district became a distinct parish for Ecclesiastical purposes, and prior to the 31st of *March, 1860*.

The Rev. *William Stevens Burd*, the perpetual Curate of *Preston Gubbald's*, deposed as to part of his Parish going with his full consent to form the district of *Leaton*; he stated that he had received no fees in respect of the publication of the banns of matrimony, the solemnization of marriages, or churchings, baptisms, or burials of persons within the portion of his parish comprised in that district since the formation of the district. "So far as I know (he added) such fees since then have belonged as of right to the Incumbent of the district without reservation. There was not, that I am aware of, any formal relinquishment of fees by me to the Incumbent, but in giving my consent to the separation of that part of my parish to form part of the district, I considered that

I had no longer anything to do with such part of my parish, either as regarded the fees or anything else." On his further examination upon interrogatories, he stated, that he was not aware that he was by law entitled to the fees in question, or that the Incumbent of *Leaton* was bound to keep an account of them; that he had not, by any instrument in writing, relinquished his right to such fees; but he added: "If I had thought at all about the fees, which I did not, I should have considered that my relinquishment of that part of my parish involved, *à fortiori*, the relinquishment of my right to the fees."

The Rev. *Daniel Nihill*, the Rector of *Fitz*, part of the district of *Leaton*, deposed to the same effect regarding the relinquishment of fees arising for offices performed in the cases of persons resident in that part of the district of *Leaton* which had been in *Fitz* parish. "I conceive, he said, that such fees would be earned at the Church of the district, which Church is not within my parish, and that, as Rector of *Fitz*, I am not entitled to them."

On the 18th of *December*, 1863, the Judge of the Arches Court (the Right Hon. Dr. *Lushington*) pronounced for the validity of the rate, and ordered the Appellant to pay the sum of sixteen shillings and threepence for which he was so rated, with costs. The judgment of the learned Judge, so far as related to the separation of *Leaton* into a distinct district for Ecclesiastical purposes, was as follows:—"The question in this case is, whether a Church-rate for this parish of threepence in the pound, made by a majority of the Vestry on the 24th of *May*, 1861, is a valid rate. It has been contended that the rate is invalid on two grounds. First, that a certain dis-

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trict called *Leaton* was liable to be assessed to the rate, and has been omitted. If this objection be legally established the rate is invalid, for a rate omitting to charge a considerable number of persons liable by law to be rated, cannot be a just and equal rate. Secondly, that the object for which the rate was made is not sanctioned by law—that the expenses to be defrayed out of it are not legal expenses—not such repairs as the law allows, but extravagant and unnecessary alterations. *Leaton* was constituted a Parish by taking parts from three other Parishes, viz., from *St. Mary, Shrewsbury, Preston Gubbald, and Fitz.* This was done in the year 1860. Now, the Order in Council by the Ecclesiastical Commissioners purporting to affect this alteration (a) states, that in pursuance of the 8th & 9th Vict. c. 70, and the 19th & 20th Vict. c. 55, they have prepared a representation, and then they go on to recommend the division in the manner stated. It is not a matter of any importance that I need particularly advert to it. And then follows the schedule, and in consequence of this recommendation of the Ecclesiastical Commissioners the Order was made. Now, I should say that there is not a word to be found in this Order in Council as to fees or anything of the kind. It was natural that I should expect to find some intimation in the Order in Council as to the fees, and as to the consents of the various parishioners, but not a word upon the subject do I find in that Order. From that time the Incumbent appointed to the new Church at *Leaton* has received for himself all the surplice fees arising within the local limits of this new Parish,

(a) Orders in Council, published by the Ecclesiastical Commissioners, Vol. XII. p. 569.

which of course includes what were formerly portions of the Parishes of *St. Mary, Preston Gubbald,* and *Fitz*. The Incumbents of the old Parishes were entitled to receive such portions of the fees during their respective incumbencies. It is alleged that they relinquished them to the new Incumbent. There is no trace of any formal instrument to that effect. The Incumbent of *St. Mary's* deposes that the fees were voluntarily relinquished by him, not by any instrument in writing, but, as he says in answer to inquiries made to the patron, he was aware that he was entitled to the fees for his life. The Incumbents of *Preston Gubbald* and *Fitz* do not appear to have had any distinct notion of their rights. Their impression appears to have been that when they consented to give up certain portions of their parishes (how they consented I know not), the fees arising from such portions were also ceded as a sort of accessory. The most important fact however is, that from the formation of the district the three Incumbents have, as a matter of fact, not received these fees, but have tacitly acquiesced in their being received by the Incumbent of *Leaton*. In this manner (which I can only characterize as most slovenly) has this business been conducted. I certainly should have imagined that it was the duty of some official (I refer to no one in particular) to take care that the consent of the three Incumbents was properly taken in writing, and duly recorded in the Bishop's registry, or some other office. In this state of things, the first question is, Have these Incumbents legally relinquished the fees in such a manner as to satisfy the statutory requisitions? The question then is, how fees may be relinquished so that the Incumbent may be barred from

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reasserting his rights. It is important here from its incidental consequences, if one of those consequences may be that *Leaton* remains liable to be assessed to the Church-rate of *St. Mary's*. On what principle it is that the relinquishment of fees shall affect Church-rates I am utterly at a loss to discover, but for the purpose of this case I will assume the law to be that there must be a relinquishment of fees,—a voluntary relinquishment, to use the words of the Statute, 6th & 7th *Vict.* c. 70. sec. 10, and that these effects, namely, the alteration of the Church-rates, are wrought by the 19th & 20th *Vict.* c. 104. s. 14. If, then, a voluntary relinquishment of fees is necessary to the constitution of a separate and distinct parish, and consequently to such separate and distinct parish raising Church-rates for its own Church, and being exempt from Church-rates for the parish to which it formerly belonged, what is it that constitutes a voluntary relinquishment of fees? Or perhaps the question would be better put in these words, What constitutes legal evidence of voluntary relinquishment of fees? Must such consent be given in writing? No doubt with common prudence and care it would require that such relinquishment should be expressed in writing. In all matters, save Ecclesiastical, such common prudence and care would be expected, but there is no such consent in writing in this case produced, and I must of course presume that if such consent in writing had been so given, those who conduct this suit would have produced it, or would have shown that diligent search had been made in the records of the Ecclesiastical Commission, and otherwise, and that such search had been in vain. I must conclude, therefore, that no such consents were

given in writing. There is no intimation that I can find in this case of any such consents in writing in any part of the evidence. Then does the law imperatively require consent in writing? The Statute does not do so in words. Does it by implication? I cannot find any expressions from which I can draw such a conclusion. I am not aware that it could be maintained as a legal proposition that all such consents should be in writing. There is a case which has been recently decided in the Common Pleas, somewhat analogous, though not precisely in point, and to that case I will now refer. It is the case of *Roberts v. Watkins*, (14 C. B. Rep. N. S. 592.) I will state shortly what that case was. Under a builder's contract certain instalments were to be paid as the work progressed, and the balance within two calendar months after the completion of the contract, provided the architect should have certified that the whole of the work had been done to his satisfaction, and it was held that it was not necessary that the architect should certify in writing. I need not go through the whole case in detail, because that is the effect of it; but Mr. Justice *Williams*, who gave the judgment of the Court in the first instance, went into a consideration of the subject, and said, 'I know of no rule of law which prevents the architect's satisfaction being certified by word of mouth.' I think that the present case may fairly fall within the principle laid down in the case I have cited. But then the question remains behind, is there sufficient evidence of a relinquishment of the fees *de facto*? Except in the evidence of the Rev. Mr. *Lloyd*, there is no sufficient evidence of any specific act of relinquishment. Then the only evidence is that, as a matter of fact, the fees

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have been taken by the Incumbent of *Leaton*, and no demand was made on behalf of the Incumbent of the three parishes out of which the Chapelry has been formed. This absence of demand dates from *March*, 1860. Is this a tacit relinquishment sufficient to satisfy the law,—the non-assertion of a lawful claim? I must admit that this is not very satisfactory evidence, but is it sufficient legal evidence? It must be assumed that the Incumbents of the old Parishes knew their legal rights. I think this is a legal presumption, and if so, the non-exercise of their rights is, I conceive, evidence of relinquishment, such as may have been contemplated by the Statute, viz., voluntary relinquishment, from which must follow the consequence that the Chapelry became a distinct Parish. On the whole (though not without much consideration) I have come to the conclusion that this objection to the rate cannot be sustained."

From this judgment and sentence founded thereon the present appeal was brought.

A preliminary objection was taken by the Respondent's Counsel, that the Appellant might have raised the whole question by appealing from the interlocutory decree made by the Court below upon the admission of the reformed articles. Their Lordships, however, held, that though such a course was open to the Appellant, he was not bound to take it, but was at liberty to reserve the question upon his appeal from the definitive sentence (a).

(a) See *Cameron v. Fraser*, 4 Moore's P. C. Cases, 1. *The Queen v. Belcher*, 6 Moore's P. C. Cases, 471. *Williams v. The Bishop of Salisbury*, 2 Moore's P. C. Cases, N. S. pp. 377. 391.

Dr. *Deane*, Q.C., and Mr. *Willis*, for the Appellant.

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Our contention is, that the rate is bad and invalid, because it did not include the district of *Leaton*, which is for Ecclesiastical purposes, still a part of the Parish of *St. Mary's, Shrewsbury*; *Leaton* being only a consolidated Chapelry, and not a distinct Parish. This is manifest from the terms of the Order in Council, which describe it; moreover, the fees for personal offices of the Church, in respect of the Chapelry of *Leaton*, have never been voluntarily relinquished by the incumbent of *St. Mary's* to the incumbent of *Leaton*. The whole question turns upon the true construction of the various Acts of Parliament relating to Church building and endowments. By section 16 of the 58th *Geo. III. c. 45*, parishes might by Order in Council be divided into separate parishes for all Ecclesiastical purposes, such division not to take effect during the incumbency of the Incumbents of the parishes to be divided; and by section 71 of that Statute districts so made were to remain liable for the repairs of the original parish Church and the making or levying rates for that purpose for a period of twenty years. This was the first Church Building Act, and was followed the succeeding year by the 59th *Geo. III. c. 134*, which was passed to render more effectual the previous Act, and gave power to form separate districts into consolidated Chapelries; the provisions, however, of the 71st section of the previous Act remained the same, and the consolidated districts were still liable to the rates made for the mother Church. The 3rd *Geo. IV. c. 72*, extended the provisions of the two previous Acts, and provided by section 20, that the district Churches should be repaired by the parishioners at large, in the same



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manner as the Church of the Parish. This Act clearly did not exempt the district from its liability for rates to the mother Church. No alteration was made in these respects by the 5th *Geo.* IV. c. 103, which was the next Church building Act. By the 6th & 7th *Vict.* c. 37. s. 9, the Ecclesiastical Commissioners were empowered to constitute districts for spiritual purposes, and such districts, where constituted, were by section 15 declared, upon the consecration of the Church, a new Parish, but it was expressly provided by section 18 that, until Parliament should otherwise determine, nothing therein contained should be construed to affect or alter any rights, privileges, or liabilities whatsoever, Ecclesiastical or Civil, of any parish, Chapelry, or district, except as therein expressly provided. The liability of a district for the general rates of the parish, therefore, still continued. The Act last cited was explained and amended in some few particulars by the 7th & 8th *Vict.* c. 94, but no alteration affecting the district's liability to Church rates was made. Then came the 8th & 9th *Vict.* c. 70, which consolidated and enlarged the provisions of all the previous Acts; section 10 provides for the performance of the offices of the Church in such consolidated Chapelry, but directs that the fees arising therefrom, unless voluntarily relinquished by the Incumbent of the Parish out of which the Chapelry shall have been formed, shall belong to such incumbent, clearly retaining the district of the consolidated Chapelry a part of the Parish for parochial purposes. The last Statute relating to this question is the 19th & 20th *Vict.* c. 104, which is an amending Act of the two former Acts, the 6th & 7th *Vict.* c. 37, and the 7th & 8th *Vict.* c. 94. But the 19th & 20th *Vict.* c. 104 has no application to consoli-

dated Chapelries, it applies to district Churches only. By the first section power is given to constitute new districts under the provisions of the previous Acts, which districts are by section 14 declared separate and distinct parishes, such as are contemplated in the 15th section of the 6th & 7th *Vict.* c. 37, which power as we have already shown, is subject to the restrictions contained in the 15th section of the same Act. There is nothing in the Act regarding consolidated Chapelries, which *Leaton* distinctly is, for the Order in Council of the 26th of *March*, 1860, which was published in the *London Gazette* of the 31st of *March*, 1860, is made, as it states, "in pursuance of the representation of the Ecclesiastical Commissioners acting under the 8th & 9th *Vict.* c. 70, and the 19th & 20th *Vict.* c. 55," and is "for the assignment of a consolidated Chapelry to the consecrated Church of the Holy Trinity situate at *Leaton*, in the Parish of *St. Mary's, Shrewsbury*." We maintain, therefore, that the Church of *Leaton*, being a consolidated Chapelry of the parish of *St. Mary*, was not exempted by any of the Statutes cited from contributing to the rates of the mother Church. But assuming that the 8th & 9th *Vict.* c. 70, and the 19th & 20th *Vict.* c. 104, do apply to consolidated Chapelries, then the requirements of the Statutes to exempt the Chapelry of *Leaton* from contributing to the rate for the mother Church have not been complied with, as there has been no legal or effectual relinquishment of the fees by the Incumbent of *St. Mary's*. This, by the 10th section of the 8th & 9th *Vict.* c. 70, is absolutely requisite, and must be legally and formally effected: a mere relinquishment of the fees does not make the incumbent of the Chapelry entitled by such authority as is intended by the Statutes, *The*

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*Queen v. Perry* (a); nor does the mere fact that the fees have in this case, partly from ignorance of law, not been demanded by the Incumbents of the old Parishes amount to a relinquishment under sec. 10 of the 8th & 9th *Vict.* c. 70, or exempt the Chapelry of *Leaton* from the operation of the 12th section of the 19th & 20th *Vict.* c. 104, which reserves the fees arising within the limits of the assigned district to the original Incumbent until the first voidance.

Mr. *Powell*, Q.C., and Dr. *Robertson*, for the Respondents.

This is entirely a question upon the proper constitution of a distinct Parish, separated for all Ecclesiastical purposes from the mother Parish, and of which the fees for the offices of the Church, performed by the Incumbent of such district, have been voluntarily relinquished by the Incumbents of the original Parishes, and such voluntary relinquishment is binding on the Incumbents, *Roberts v. Watkins* (b).

LORD CRANWORTH :

That is really the only question which their Lordships feel any difficulty about; the distinction between district Parishes and consolidated Chapelries, which has been so elaborately argued before us, we feel no doubt, from the judgment of the learned Dean of the Arches, was brought fully under his notice and received his especial consideration, and their Lordships are not disposed to differ with him on that point; they wish the Counsel for the Respondents to apply themselves to the question of the relinquishment of the fees for the offices of the Church performed in the district parish or consolidated Chapelry.

(a) 30 L. J. Q. B. 141.

(b) 14 C. B. Rep. N. S. 592.

Argument resumed :

The case is, no doubt, that there has been a sufficient relinquishment of the fees to the Incumbent of the district of *Leaton* within the meaning and effect of the Statutes, 8th & 9th *Vict.* c. 70, and the 19th & 20th *Vict.* c. 104. Section 10 of the first Act provides for the retention of the fees only in cases where the Incumbent of the mother Church shall not have voluntarily relinquished the same, whereas the 14th section of the 19th & 20th *Vict.* c. 104, without alluding to the relinquishment of fees by the Incumbent of the mother Church, assumes, where the district has become a separate and distinct Parish, that the Incumbent of such district is entitled for his own benefit to the entire fees for the performance of the offices in his Church without any reservation thereof, he having at the same time the exclusive cure of souls within such district. Now, we apprehend, if there had been no absolute abandonment of the right, but only the non-interference in the reception of the fees, that would have been a sufficient voluntary relinquishment within the meaning and construction of these Acts. But the case is much stronger : no fees have been received or claimed by either of the Incumbents of the Parishes out of which the district of *Leaton* is taken, and the Incumbents themselves all depose to their belief that the fees taken for offices performed in that district did not belong to them. The Rev. Mr. *Lloyd*, the Incumbent of *St. Mary's, Shrewsbury*, says "all the fees in respect of that portion of *Leaton* which was within my Parish of *St. Mary* were voluntarily relinquished by me as Incumbent of *St. Mary's* to the Incumbent of *Leaton* district." The Rev. Mr. *Burd*, the perpetual Curate of *Preston Gubbald's*, says "there

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was not, that I was aware of, any formal relinquishment of fees by me to the said Incumbent (that is, the Incumbent of *Leaton*), but in giving my consent to the separation of that part of my Parish to form part of the said district, I considered that I had no longer anything to do with such part of my Parish, either as regards the said fees or anything else ;” and the Rev. Mr. *Nihil*, the Rector of the Parish of *Fitz*, says he has not, since the formation of the district of *Leaton*, received any such fees. “ I conceive,” he adds, “ that such fees would be earned at the Church of the district, which Church is not within my Parish, and that as Rector of *Fitz* I am not entitled to them.” This is sufficient evidence not alone of the tacit, but the absolute relinquishment of the fees, which constitutes *Leaton* a distinct and separate Parish, and renders it independent of any rates made by the Parish of *St. Mary, Shrewsbury*, out of which it was in part originally taken. There is nothing, as observed by the learned Judge in the Court below, to render it imperative that the relinquishment of fees should be in writing, however desirable such a course may be.

Lord CRANWORTH :

The sole question in this case is, whether or not *Leaton*, or any part of it, remains a portion of the Parish of *St. Mary, Shrewsbury*. No doubt a part of it did once belong to that Parish, and the question, therefore, is, whether it has ceased to belong to it. From the Statute 58th Geo. III. c. 45 downwards, there have been passed a number of Acts of Parliament authorizing Commissioners to create new Ecclesiastical districts. The earliest power given to them

was, that where Parishes were populous and large they might take out of those populous and large Parishes a district, and form it into a separate Ecclesiastical district. It was soon found that this power did not meet the whole evil it was meant to remedy. It might be inconvenient or impossible to take a district out of one Parish and make a separate Parish of it; but there might be several Parishes lapping into one another, out of all of which a new district might conveniently be taken. Powers for this purpose were given by the Statute, 59th *Geo. III.* c. 134, and the new district so formed is in the Act called a Consolidated Chapelry.

The regulations by which these new districts when formed were to be governed must have been intended to be the same, whether they came out of one Parish or out of several Parishes, and whether they are designated as districts or Chapelries.

That being so, their Lordships will now refer to what the enactment is on which it is contended that this district of *Leaton* has become a separate Parish. In the 19th & 20th *Vict.* c. 104, s. 14, it is enacted that whenever "the solemnization of marriages, churchings, and baptisms according to the Laws and Canons in force in this Realm are authorized to be published and performed in any consecrated Church or Chapel to which a district shall belong." We must here pause to say, that by an Order in Council in 1860, a district taken out of the Parish of *St. Mary, Shrewsbury*, and several adjoining Parishes, was annexed to a consecrated Chapel. There was undoubtedly, therefore, a district to which a consecrated Chapel belonged. Then the section proceeds, "Such district not being at the time of the passing of this Act

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a separate and distinct Parish for Ecclesiastical purposes, and the Incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct Parish for Ecclesiastical purposes." And by the next section it is provided, that not only shall the new Parish become a separate Parish for all Ecclesiastical purposes, but the inhabitants of that Parish are to be for Ecclesiastical purposes parishioners of that Parish and of no other Parish, and all the laws relating to Ecclesiastical matters as to that Parish are to apply to that Parish and to no other.

The question, therefore, is, whether the Incumbent of this new consolidated Chapelry has become entitled under such authority as mentioned in the Act to the fees arising from the performance of the Ecclesiastical offices therein mentioned. This raises two questions. Has he become entitled to these fees? And, if so, has he become so entitled by virtue of "such authority," within the true meaning of those words as they are found in the 14th section of the Act? The question whether he has become entitled to these fees depends upon this. He was not entitled simply by the constitution of the Ecclesiastical district, *i. e.*, the consolidated Chapelry, because by the law in force previously to the 19th & 20th *Vict.* c. 104, with reference to the constitution of such districts, the Incumbent of the old Parish continues to be entitled to them, unless some other arrangement is made. But by this new Act a considerable change is made. The enactment on this subject is to be found in the 12th section of that Act, which enacts

that from and after the next avoidance of such incumbency or the relinquishment of such fees by such Incumbent, *i.e.*, the Incumbent of the original Parish, then the fees shall belong to the Incumbent of the new district.

We are clearly of opinion, that in the case of a consolidated Chapelry the words "such Incumbent" must mean the Incumbents of all the Parishes out of which the Chapelry has been formed. The question, therefore, is, Have the fees belonging to *St. Mary's, Shrewsbury*, and the other two Parishes, or have they not, been relinquished? That was a question of fact which the learned Judge below had to decide. There is no doubt it is a question of some nicety. Of the three Incumbents one of them says, "I did expressly give them up:" the other two, in substance, say, "I made no formal resignation, but when I gave up the right to the Parish, which I was asked to give up and did give up, I considered that I gave up everything." Three years after this happened they are examined, and they do not pretend to say that they have been otherwise advised since. What takes place after the institution of the suit, is of course no otherwise important than as affording evidence of what the witnesses meant to do at the time when the district was formed. But we think the learned Judge came to a right conclusion; and even if there were more doubt about it than there is, it is a principle of every Court of appeal upon a question of fact, that if a matter has been fairly and fully considered in the Court below, unless the Court of appeal is able to say that the decision of the fact was clearly wrong, it should not be disturbed. Therefore, upon that question of fact, we concur with the learned Judge below.

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Then it was said that what was to be proved was not merely that the Incumbent had become entitled for his own benefit to the fees, but that he had become so entitled "by such authority," that is, the authority referred to in the 14th section of the 19th & 20th *Vict.* c. 104. All these Acts are, unfortunately, very loosely worded; but when we come to look at the section we see that what must have been meant was the whole authority under which the district was constituted, including the 12th section of the Act, and by that section it was expressly provided that the relinquishment of fees by the Incumbent of the old Parish should be one mode in which the Incumbent of the new district should become entitled to them. We think, therefore, that the judgment of the Court below must be affirmed, and the appeal dismissed with costs.

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ON APPEAL FROM THE HIGH COURT OF  
ADMIRALTY OF ENGLAND.

JAMES BERNHARD MANN AND } *Appellants,*  
OTHERS - - -

AND

WILLIAM MALCOMSON AND } *Respondents.\**  
OTHERS - - -

THE "BETA."

THIS was an appeal from a decree of the High Court of Admiralty in a cause of damage brought by the owners of the barque "*Fides*" against the owners of the Irish screw steamship "*Beta*," to recover for the loss arising from a collision between them off *Deptford* buoys in the river *Thames* on the 6th of *May*, 1864.

The Judge of the Court below (the Right Hon. Dr. *Lushington*, assisted by two of the Elder Brethren of the Trinity Corporation, arrived at the conclusion that the blame of the collision was solely imputable to the Pilot in charge of the "*Beta*," overruling an

\* Present: Lord Chelmsford, the Lord Justice Knight Bruce, and the Lord Justice Turner.

9th Feb.  
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By the 374th section of the Merchant Shipping Act, 17th & 18th Vict. c. 104, it is provided, that no license granted by the Trinity House shall continue "in force beyond the 31st day of *January* next ensuing the date of such license; but that the same may, upon the application of the Pilot holding such

license, be renewed on such 31st day of *January* in every year, or any subsequent day." Held by the Judicial Committee, affirming the decree of the Court below, that a Pilot's license renewed on the 20th of *January* was within the intention of that provision, so as to be in operation and effect on the 6th of *May* following.

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objection taken to the validity of his license, and deciding that the employment by the "*Beta*" of the Pilot being compulsory, the owners were provided by the 358th section of the Merchant Shipping Act, 1854, and pronounced against the damage proceeded for.

The objection to the validity of the license was, that it had been renewed on the 20th instead of on the 31st of *January*, 1863, the day expressly named for the renewal of licenses by the 374th section of the Merchant Shipping Act, 1855, and that consequently it was not in force at the time of the collision on the 6th of *May*, 1864. This question was argued in the Court below, when the learned Judge gave his decision upon that point in the following terms:—"I must now give my judgment upon that 374th section. The license has been duly entered at the Custom House according to the Merchant Shipping Act of 1855, and it appears that the object of that section is to confer the license from 'thenceforth,' that is, whatever may be the date (and the original date of this license is 1855) up to the 31st of *January* next ensuing, and not longer. There have been several renewals of this license, and the last of them was on the 20th of *January*, 1864, (the collision took place in the month of *May*,) some time, therefore, after the 31st of *January*. It has been contended that, according to the terms of the Statute, this renewal of the license only lasted till the 31st of *January*, 1864, and consequently that, at the time of the collision itself, there was no operative license, and that the Pilot, therefore, was not a licensed Pilot, but the servant of those who employed him, and that they alone are responsible for his acts. Now, I am fain to confess, with regard to this 374th

section, that any construction I put upon it, is subject to some difficulty and attended with inconvenience ; and this being so, I look to the consequences of the different constructions upon that section proposed, and if very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively require it, it is the duty of the Court to prefer such a construction that *res majis valeat, quam pereat*. It is stated in the argument, that unless the construction urged on the one hand of the Statute be adopted, it will be next to impossible to have any licensed Pilot at all at certain periods of the year, and that there would be the greatest possible inconvenience arising if all Pilots were compelled to come to *London* with their licenses for the purpose of getting them renewed at a particular time. It must be recollected that a Pilot cannot separate himself from his license, because he is bound always to have his license with him, and bound to produce that license when he boards a vessel and takes charge of her. That difficulty has been most rightly urged, and the consequences would certainly be most detrimental to navigation if I were to impose on the section the construction asked by the other side, for I can hardly conceive any greater inconvenience than that Pilots should be without licenses, or should be compelled to come in a body for the purpose of renewing them. That is the inconvenience upon the one side. On the other hand, I am aware if I adopt the construction of Dr. *Deane*, the license may be renewed at any part of the year, and that is certainly not the intention of the legislature, and I quite agree with the Solicitor-General, that that would be contrary to the spirit of the Act of Parliament, and

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for this reason, that the license ought not to be renewed until the appointed period of expiration, and when the conduct of the Pilot has been such as to merit the renewal of such license. The words of the 374th section are, 'Subject to any alteration to be made by the Trinity House, no license granted by them shall continue in force beyond the 31st of *January* next ensuing the date of such license.' Now, that would be plain and plain enough, if I were satisfied what is to be considered the date of such license, but I am not satisfied what is meant by the Legislature by the date of such license. I do not apprehend that it necessarily follows that the date of such license is the day of the renewal, or rather of the application for the renewal of such license (not necessarily), 'but the same may, upon the application of the Pilot holding such license, be renewed on such 31st day of *January* in every year, or any subsequent day.' Now, there are two modes of considering this, bearing in mind that there is a distinction between an application for a renewal and a renewal itself. Now, my understanding of this section is, that the license which lasted until the 31st of *January* might be renewed; it might upon application upon that day be renewed on the 31st of *January* in every year, or might be renewed on any subsequent day, and undoubtedly these are very strong words and very difficult for the Court to get over; but it is the inclination of my opinion, admitting the doubt and difficulty, that the meaning of this was, that the renewal might operate from the 31st of *January* in every year, and that it was to be in the power of the Trinity House at any subsequent date afterwards to renew that license, if they thought fit, yet that the Trinity House are not estopped by this section from ordering, not from renewing—for

that is not the expression I mean to use—but from ordering licenses to have fresh operation from the 31st of *January*, that being the day on which the effect and operation of all licenses necessarily ceases, under the tenor of the Act of Parliament. Looking at the mischief which would accrue from a contrary construction, though with considerable doubt, this is the construction I must put upon the section. I, therefore, hold this Pilot to have been duly licensed, and dismiss the action of the Plaintiffs without costs.”

From this decision, as well as from the judgment in the principal cause, the Appellants appealed to Her Majesty in Council; but upon the appeal coming on for argument their Counsel agreed to waive all questions relating to the facts of the collision, which they admitted was solely occasioned by the “*Beta*,” and to rest the case on the invalidity of the license of the Pilot, upon the construction of the 374th section of the Merchant Shipping Act, 1854.

The Queen’s Advocate (Sir *R. Phillimore*, Q.C.),  
and the Admiralty Advocate (Dr. *Twiss*, Q.C.),  
for the Appellants.

The 374th section of the Merchant Shipping Act, 1854, which provides for the continuance and renewal of Pilots’ licenses, says, “Subject to any alteration to be made by the Trinity House, no license granted by them shall continue in force beyond the 31st day of *January* next ensuing the date of such license, but the same may, upon the application of the Pilot holding such license, be renewed on such 31st day of *January* in every year, or any subsequent day, by indorsement under the hand of the Secretary of the

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Trinity House, or such other person as may be appointed by them for that purpose." No alteration having been made, licenses under this section can only be renewed on the 31st of *January*, or on a subsequent day. Now, this license by the indorsement on it purports to have been renewed on the 20th of *January*, 1863, to the 20th of *January* next ensuing, whereas it ought to have been renewed on the 31st of *January*, 1863, to the 31st of *January*, 1864; it was, therefore, valid only for the time from its renewal, the 20th to the 31st of *January*, 1863. The renewal of a license must be after its expiration; it cannot be before. The Pilot's license under the 374th section of the Merchant Shipping Act, 1854, must be strictly construed, as the pilotage certificate would be under the 355th section, where, if the person described as the owner of the ship is not so, either at the time of the granting of the certificate or of the collision subsequently, it has been expressly held that the certificate is bad. In *The "Earl of Auckland"* (a), all the sections of that Act relating to compulsory pilotage are fully considered. The opinion of the learned Judge of the Admiralty Court was clearly against the validity of the license in this case, upon the strict and legal construction of the Act; but he was influenced by a consideration of the mischief that might ensue from such a construction.

They referred also, with respect to the exemption by compulsory pilotage, to *Hammond v. Blake* (b), *The Queen v. Stanton* (c), and Statute 16th Geo. IV. c. 125, s. 59.

(a) Lush. 164.

(b) 10 Barn. & Cr. 424.

(c) 8 El. & Bla. 445.

Dr. *Deane*, Q.C., and Mr. *Clarkson*, for the Respondents.

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This is the first time that such an objection to a Pilot's license has been made. The taking of the Pilot on board is compulsory by the 353rd section of the Merchant Shipping Act, 1854. The Master or owner of the vessel has no option. How is he to ascertain whether the license of the Pilot has been properly renewed, and whether, therefore, the Pilot is a duly licensed Pilot? he can only require production of the license, and if, upon the face of it, it is formal and regular, he must accept the Pilot's services. It never could be intended by the Legislature that he should examine the propriety of the renewal of the license, or the circumstances under which that renewal was made, or become liable for the latent defects in the Pilot's license or title to his office. When the law compels the owner to employ a Pilot, it protects him from responsibility, when it is solely the fault of the Pilot on board. The "*Diana*" (a), and The "*Maria*" (b). This latter case was under the Statute 41st Geo. III. c. 86, s. 6, relating to Foreign vessels.

The Lord Justice TURNER:

This case depends mainly, if not entirely, upon the construction to be put upon the 374th section of the Merchant Shipping Act, 17th & 18th Vict. c. 104. The section is in these terms [his Lordship read the section, *ante* 26]. To say there is no difficulty in the construction of this section would be going perhaps a little too far, but their Lordships have arrived at a clear conclusion upon the right construction which is to be put upon the section. It seems to their Lordships that the section admits of two con-

(a) 4 Moore's P. C. Cases, 11. (b) 1 W. Rob. 95.



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structions, at least that part of it which it is necessary to consider upon the present occasion, namely, that part which refers to the renewal of the license. It may either mean that the act of renewal is to be done on the 31st of *January* next ensuing, or any subsequent day, or that the effect of the renewal when made is to be from the 31st of *January*, or from the subsequent day on which the renewal may be made, and the question seems to their Lordships to depend upon whether the act of renewal, or the effect of renewal, was what the Legislature was looking to at the time the Statute was framed, and they are of opinion that what the Legislature intended was the effect of the renewal, whether made on the 31st of *January* or any subsequent day. That construction falls in with the provision of the 388th section of the Act, by which the owners of a ship are exonerated from liability by the fault or incapacity of any qualified Pilot acting in charge of such ship.

Now, it never could, in their Lordships' estimation, be the intention of the Legislature that the Master or shipowner's liability should depend upon the date when the Pilot's license should have been renewed by the Trinity House, whether it was renewed before or after the 31st of *January* in any year; but it might well depend upon the circumstance of the renewal taking effect before or after the 31st of *January*. Again, the construction of the 374th section which their Lordships are giving falls in with the general convenience and almost the necessity of the case, because it is obvious that the greatest possible inconvenience must result in all cases, if the construction contended for on the part of the Appellants in this case could be maintained; for the necessary consequences would be, that from a certain period, certainly hours, probably

days, and possibly weeks, there would be no qualified Pilots within particular parts of the district to which the Act of Parliament applies. Looking, therefore, to the language of that section, and the inconvenience that would result from the construction contended for by the Appellants being maintained, their Lordships agree entirely with the opinion of the learned Judge of the Admiralty Court from whose decision this appeal has been brought, and think that the appeal should be dismissed, and with costs.

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## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THE GREAT SHIP COMPANY (LIMITED) }  
THE OWNERS OF THE STEAMSHIP } *Appellants,*  
"GREAT EASTERN" - - - }

AND

HENRY SHARPLES AND ANOTHER - *Respondents.\**

### THE "GREAT EASTERN."

IN this case the Respondents, the owners of the "*Jane*," sued the "*Great Eastern*" to recover damages for the loss of their ship, occasioned by a collision with the "*Great Eastern*," which took place

13th July,  
1864.

Collision in the Atlantic ocean at mid-night between *G.* a steamship of unusual size and tonnage, and *J.* a sailing-vessel.

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Master of the Rolls (The Right Hon. Sir John Romilly).

*G.* going at a rate of between twelve and thirteen knots an hour. *J.* sailing close-hauled on the "port tack," and being two or three miles distant, when she first sighted *G.*, instead of keeping her course, ported her helm. Held—  
First, that under the 18th Art. of the Sailing Regulations, issued

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about 2 a.m. of the 18th of *September*, 1863, in the Atlantic Ocean, whereby the "*Jane*" vessel was totally lost.

The "*Jane*" was a sailing ship of 775 tons, and at the time of the collision was on a voyage from *Liverpool* to *Quebec* in ballast; she was sailing close-hauled on the port tack. The "*Great Eastern*" was a vessel of unusual size and tonnage, propelled by both screw and paddle engines, and was bound from *New York* to *Liverpool*, going between twelve and thirteen knots an hour, and did not observe the "*Jane*" until very shortly before the collision.

In the "*Jane's*" preliminary Act it was averred that "upon the bright light of the '*Great Eastern*' being observed, and before the green light was seen, the helm of the '*Jane*' was put hard a-port."

It was pleaded, on behalf of the "*Great Eastern*," that the approach of the "*Jane*" was first discovered by the look-out forward on board the "*Great Eastern*" sighting an apparently bright light, distant about a mile and from two to three points on the starboard bow, approaching the "*Great Eastern*." The look-out thereupon struck two bells to signal an object on the starboard bow, and the light was then seen by Mr. *Billinge*, the chief officer of the watch, who ordered

in pursuance of The Merchant Shipping Act Amendment Act, 1862, it was the duty of *J.* to have kept her course without alteration, unless, as provided by Art. 19, the danger of collision was so imminent when *G.* was sighted as to render a departure from the 18th Art. necessary to avoid danger, and that she was, therefore, partly to blame for the collision, having contributed to it by porting; and

Secondly, that *G.* was also to blame, as, even if *J.* had kept her course, from the rate of speed *G.* was advancing a collision was inevitable, it being, under Art. 15 of the Sailing Regulations, the duty of a Steamer meeting a sailing-vessel to reverse her engines and slacken her speed in sufficient time, so as, having regard to the state of the weather, as far as possible, to avoid a collision.

the helm of the "*Great Eastern*" to be starboarded, and both paddle and screw engines to be stopped and reversed, all which orders were promptly obeyed, and that the "*Great Eastern*" payed off considerably under her starboard helm, and her speed was very considerably slackened, but the two vessels notwithstanding came into collision.

The effect of the evidence is fully considered in their Lordships' final judgment.

In the Court below it was admitted, on both sides, that the parts of the two vessels which first came in contact were the port bow of the "*Jane*" and the starboard bow of the "*Great Eastern*," and that the "*Jane*" then fell alongside of the "*Great Eastern*," and under her starboard fore sponson, which caused further damage to the "*Jane*," which was so damaged as to be reduced to a wreck, and eventually abandoned. It was charged, on behalf of the "*Great Eastern*," that the collision was caused by the "*Jane's*" disobedience of the new steering and sailing regulations issued in pursuance of The Merchant Shipping Act Amendment Act, 1862 (*a*). The 15th, 18th, and 19th articles of those regulations, applicable to the circumstances of this case, are as follows:—

15. "If two ships, one of which is a sailing ship and the other a steam-ship, are proceeding in such directions as to involve risk of collision, the steam-ship shall keep out of the way of the sailing ship."

18. "Where, by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article."

19. "In obeying and construing these rules, due

(*a*) See these rules Lush. Adm. Rep. App. p. LXXVI.

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regard must be had to all dangers of navigation ; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger."

In addressing the Elder Brethren, the Judge of the Admiralty Court (the Right Hon. Dr. *Lushington*) said, this is a case of considerable importance, not merely with regard to the value at stake, but to the legal considerations that are involved in it,—legal considerations which will require the Court, for the first time, to pronounce an opinion upon the construction of some of the new regulations for preventing collisions; and after commenting on the evidence the learned Judge proceeded:—"Let us see, with reference to these circumstances, how far the new sailing and steering rules apply, and as to the application of these rules to night navigation. I would observe, that the mere discovery of a strange light does not necessarily immediately bind a person in charge of a vessel to follow any particular rule, but as soon as he has opportunity of ascertaining by reasonable care and skill what the strange vessel is, and what course she is pursuing, then the rule which is applicable to the circumstances at once becomes binding upon him. Now, article 15 says, 'If two ships, one of which is a sailing ship, and the other a steam-ship, are proceeding in such directions as to involve risk of collision'—that is to say, where there is a probability a collision would take place, if both proceeded on their respective courses, then—'the steam-ship shall keep out of the way of the sailing ship;' she must keep out of the way, but may do so according to circumstances, either by porting or

starboarding, all former regulations and rules being repealed. This article intimates, but does not define, the duty of the sailing ship, but the eighteenth article prescribes, 'Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.' The purpose of this article is obviously this, that as an obligation is imposed on one vessel, say vessel *A*, to keep out of the way, with liberty to carry out that obligation either by starboarding or porting, the other vessel, *B*, is directed to keep on her course, so that she may not interfere with any course or measure taken by vessel *A*. That brings us directly to the consideration of the present case. The "*Jane*" sees the white bright light of the steamer, and she sees that bright light approaching. If you are of opinion, looking at the facts of the case, that she unnecessarily ported, and, therefore, contributed to the collision, you will hold the "*Jane*" to blame, but there is a great deal to be said before we arrive at that conclusion. There is a qualification here of great importance 'subject to the qualifications contained in the following Article,'—Article 19,—'In obeying and construing these rules, due regard must be had to all dangers of navigation.' Now, when a steamer is approaching a sailing vessel, on such a course as would involve the risk of collision, how long is the sailing vessel to keep quiet and do nothing to avoid it? That she ought not hastily and without strong reason to deviate from the direction of keeping her course, we shall all agree, but under what circumstances for the salvation of life, or for the safety of the ship, such deviation may be allowed, is a question for your consideration generally,

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and more particularly under the circumstances of this case. The 19th Article then goes on to state, 'and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger.' Then bearing this qualification in mind, let us consider what the evidence is with regard to the conduct of the '*Jane*;' I am sorry to say it is involved in some obscurity, but in this case, as in all others, we must not hastily depart from the statements which we find in the preliminary Acts. Did or did not the '*Jane*' for a certain length of time continue her own course unchanged, and when she altered her helm, was it at a time of danger, was the danger imminent, was the measure taken for the sake of saving the lives of the persons on board? Now, in the preliminary Act of the '*Jane*,' in answer to the question, what measures were taken, and when, to avoid the collision, it is stated, 'upon the bright light being observed, and before the green light was seen, the helm of the '*Jane*' was put hard-a-port.' If we took that literally, and came to the conclusion that when the bright light was observed there was no danger at all, then unquestionably it might be contended, and with great effect, that the '*Jane*' put her helm hard-a-port at an unnecessarily early period, but you must take into your consideration the whole of the facts of the case, and not a part of them. The mate has sworn distinctly he put the helm a-port, not a word whether before he saw the green light, or after he saw the green light, but he stated he put the helm a-port in order to save life, for those were the very words he used. Now, seeing the green light

is the strongest possible evidence of danger being imminent, but it is not the only thing from which circumstances of immediate danger might be inferred. All I can say upon this point, for you know the evidence so well, is that you must come to a conclusion either that the '*Jane*' ported her helm unnecessarily, and without reason, and when there was no such necessity for the safety of life, or that the helm was not ported until it became necessary for the safety of the vessel, and consequently was a justifiable act. I have done with the '*Jane*,' and now come to the case of the '*Great Eastern*.' You have heard the evidence of Captain *Paton*, and I have no doubt that that gentleman has given his evidence to the best of his knowledge and ability, and that he has stated truly the opinion which he has formed. That opinion is this, that the '*Great Eastern*' was proceeding at the rate of from twelve to thirteen knots an hour, which is an undoubted fact in this case, but that the night, though represented in his own preliminary act, and in that of the other side, to have been dirty and dark, was such that he could with certainty have discovered the lights of the other vessel at a sufficient distance to have obeyed the regulations and avoided the collision. This is matter of opinion as to what might be done under given circumstances, but let us stop one moment. There is a most important fact in this case, which has weighed with me throughout, with regard to the evidence produced on the part of the '*Great Eastern*,' and it is this, the evidence with regard to seeing and not seeing the '*Jane's*' lights. According to the statement, so far as I can make it out, of the witnesses, one and all, there are three of them who do depose that they saw a light,—what

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description of light is certainly very singular. Now, we must take it as an undoubted fact, because the evidence proves it, that the '*Jane*' carried the proper lights, and that they were burning properly,—it is proved by affirmative evidence, and negatived by no evidence whatever, except that of witnesses who only say that they did not see them. What possible light could these witnesses on the '*Great Eastern*' have seen, if they did not see either the green or red light? Now, you are so very well conversant with these matters, and you know the build of such a vessel as the '*Jane*,' and you know where the binnacle light would be, and know perfectly well what description of light it throws. Do you believe that this binnacle light was seen at the distance of half or three quarters of a mile? and if you do, do you believe the other two lights—one or other of them—could not have been seen by those on board the '*Great Eastern*?' and do you believe that the binnacle light dazzled and obscured those on board the '*Great Eastern*?' Gentlemen, I leave that for your consideration, but we must arrive at some conclusion with respect to these lights. If they had been seen in due time, it is necessarily to be inferred, that measures might have been taken on board the '*Great Eastern*' which would have prevented the collision in question, because then there would have been, according to the evidence of Captain *Paton* himself, sufficient time and opportunity to have avoided any accident. Well, now what reason can we assign for it? I think myself we cannot assign the binnacle light. I do not like to say we can assign it to the want of a good look-out, though possibly that might have been the reason; and I think it is also consistent with probability that it was

the state of the night, which was occasionally drizzling rain, which prevented the lights being seen at all, though that is wholly inconsistent with the story. If you think for any of these reasons that either because the night was so dark that the light could not have been seen, that, therefore, it was not seen; or if you think it was the want of a look-out that prevented it being seen, and that the consequence, therefore, was that proper measures were not taken in time, then you must hold the '*Great Eastern*' to blame. I say nothing about the measures which were taken at the last moment. I have no doubt as soon as ever the officer in charge of the deck was aware there was a light in the immediate vicinity, approaching in such a direction as to involve danger, that measures were taken with the greatest promptitude in order to avoid it, but unfortunately too late."

After consultation with the Elder Brethren the learned Judge declared that they were of opinion that the "*Great Eastern*" was solely to blame for the collision, as she was going too fast and had no look-out, and condemned her in the damages sued for, with costs.

The present appeal was brought by the owners of the "*Great Eastern*" from this decree.

Mr. Rolt, Q.C., Mr. Hannen, and Mr. Pritchard,  
for the Appellants.

The averment in the "*Jane's*" preliminary Act is, by the rule of the Admiralty Court of 1859, in respect of preliminary Acts, a conclusive admission, and the owners are bound by it. The "*Vortigern*"<sup>(a)</sup>. It shows that the "*Jane*" did not continue her course as she

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was bound to have done by the 18th Art. of the new regulations, but by porting she neutralized the effect of the "*Great Eastern*," having put her helm hard-a-starboard to avoid her. The "*Inflexible*" (a). While we admit it was by the 15th, 18th & 19th Articles of the new regulations the duty of the "*Great Eastern*" to avoid the "*Jane*," by whatever means she thought proper, yet we contend it was the duty of the "*Jane*" to keep her course. The conduct of the "*Jane*" was not calculated to avoid immediate danger under the 19th Article, but on the contrary to occasion danger. The "*Great Eastern*" was properly navigated, and she would have avoided the collision if the measures taken by her had not been frustrated by the conduct of the "*Jane*."

Mr. Brett, Q.C., and Mr. V. Lushington for the Respondents.

It was, by the 15th Art. of the new regulations, the duty of the "*Great Eastern*" to "keep out of the way," and that steam-ship was solely to blame for the collision. The evidence shows that the "*Jane*" kept her course as long as it was reasonable and proper she should do so, and that her helm was only ported at last to avoid immediate danger in order to save life.

#### THE MASTER OF THE ROLLS.

23rd July,  
 1864.

The collision in this case took place in the Atlantic ocean, on the 18th of *September* last, about two hundred miles west of *Cape Clear*. The "*Jane*," a vessel of 775 tons, was close-hauled on the port tack, heading north-west, and making about seven knots per hour.

(a) Swab. 35.

The "*Great Eastern*" is a steam-ship of unusual size, of 13,344 tons burden; she was heading east by south half south, going at full speed, under both steam and sail, and making about thirteen knots per hour. The wind was west-south-west. The collision took place by the starboard bow of the "*Great Eastern*" striking the port bow of the "*Jane*." Two men on board the "*Jane*" were killed by the collision or falling of the spars; the rest of the crew escaped on board the "*Great Eastern*." The blow was angular, that is, at the moment they were both going nearly in the same direction. The "*Jane*" was not sunk by the first collision, but she was, by it and the subsequent grinding down and rolling of the "*Great Eastern*," reduced to a wreck and abandoned. The case comes within the new regulations issued in *January* 1863. By those regulations it was the duty of the "*Great Eastern*" to slacken her speed, to stop and reverse her engines, and if the weather was foggy to go at a moderate speed. It was also the duty of the "*Great Eastern*" to keep out of the way of the "*Jane*," and by article 18, where by the above rules one of two ships is to keep out of the way, the other shall keep her course subject to this qualification, that these rules need not be followed in any special circumstances which may render a departure from them necessary in order to avoid immediate danger.

In this state of circumstances the duty of the "*Jane*" was to keep her course without alteration, unless the collision was so imminent when the "*Great Eastern*" was first discovered as to render a departure from the above rules necessary for the purpose of avoiding danger. Both vessels were carrying their proper lights. This is disputed on behalf of the

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"*Great Eastern*," who contends that if the "*Jane*" had carried her proper lights they would have been observed on board the steamer, which they were not; but, the evidence on behalf of the "*Great Eastern*" states, only a bright light was seen, as if a lantern had been shown over the side of the vessel. In answer to this on behalf of the "*Jane*" it is replied, that there could not have been a good look-out on board the "*Great Eastern*," or that the red light of the "*Jane*" would have been observed. The evidence is distinct on behalf of the "*Jane*" that the lights were properly fixed and duly trimmed, and if they were not seen on board the "*Great Eastern*," it appears to their Lordships, that this could only have arisen from the circumstance, either that the look-out was not sufficient, or that the state of the weather prevented their being observed. Their Lordships first proceed to consider the evidence relative to the "*Jane*," for the purpose of ascertaining whether she adopted the course which, having regard to the position of the vessels and the new rules, it was her duty to take.

It is established by the evidence that the white light of the "*Great Eastern*" at the foremast head was the light first seen. *Andrew Matthie*, one of the look-out men on board the "*Jane*," states that he first saw the white light, and that he did not see the green light till they were about twenty or thirty yards off.

*Phillips*, the mate of the "*Jane*," saw first a mast-head light, a bright light, and he did not see the green light until after he had given the order to port the helm. *Verso*, the man at the helm, saw one light and afterwards saw the green light. *Law*, the other look-out man, saw only one light, did not

distinguish the colour, but thinks that it was about two or three miles off. Their Lordships consider it to be clear that the mast-head light of the steamer was the light so seen. The distance it was off when first seen is variously stated. *Phillips* thinks it was about a mile and a half, but he corrects this in his answer to the next question, and says from two to two and a half miles. *Law* thinks it was about two or three miles. The other witnesses give no statement on this subject. Their Lordships consider that the distance at which the mast-head light of a steamer is off when first observed, unless quite close, must be mere conjecture. Except the brightness of the light, the only indication is the angle above the horizon at which the light is seen, and a more distant light might present the same angle as a nearer light if the elevation of the distant light were greater; and if the more distant light were in fact brighter than the nearer one it might present the same appearance of distance. The only other criterion of distance is the time which elapsed before the collision took place; this is also necessarily vague from the imperfection of the recollection of men under such circumstances, when anxiety of mind and the rapidity of events crowded into a short space of time have a natural tendency on recollection to make the time seem longer than it really was. On this point, however, there is much agreement in the evidence of the witnesses on board the "*Jane*."

*John Law* says, "It was about a quarter of an hour from the time we first saw the light till she struck." *Andrew Matthie* says, "Somewhere about ten minutes; to the best of my idea, between ten minutes and a quarter of an hour." "It would be about nine

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minutes or so from the time when I reported the white light until I saw the green light."

This estimate of time agrees well with the evidence given in behalf of the "*Great Eastern*," which puts the time which elapsed between the first observation of the "*Jane*" and the collision at about five minutes, it being obvious that the mast-head light of the steamer would have been discerned on board the "*Jane*" a considerable time before, from the deck or paddle-boxes of the steamer, the light on the bows or the deck of the "*Jane*" could be observed.

*Phillips* does not appear to have been asked the time which elapsed between the first observation of the light on board the "*Great Eastern*" and the collision taking place. As, however, the vessels were approaching each other at the rate of a mile in every three minutes, the nine or ten minutes spoken of by the two witnesses, *Law* and *Matthie*, would agree with the evidence which puts the vessels at from two to three miles off when the "*Great Eastern*" was first seen on board the "*Jane*."

To arrive at a satisfactory conclusion as to the answer to be given to the next question is very important. Did the "*Jane*," on first observing the "*Great Eastern*," port her helm, or did she not do so till after the green light of the "*Great Eastern*" was observed, when it is admitted on both sides that it was proper to do so in order to save the lives of all on board?

If the "*Jane*" on the first observation of the mast-head light of the "*Great Eastern*" was ten minutes off, and from two to three miles distant, and if she then ported her helm, she was in the wrong, and acted contrary to the 18th article of the new regulations, which has been already mentioned.

The evidence of *Phillips*, the mate, who had charge of the vessel, on first examining it, seems to be confused and contradictory on this point. He says, "When I first saw it, I should say it was about a mile and a half; when I shifted the helm it would be about a mile and a quarter." He is asked—"At the time you gave that order, could you see the other ship, or could you only see the light?—A. I could not see her green light then. Q. Did you see the green light before you gave the order, or not?—A. I never saw the green light till after I had given the order. Again—Q. You say that after you had given the order to put the helm hard-a-port, you saw the green light of the other vessel; is that so?—A. Yes."

In cross-examination, he says:—"We ported our helm for the safety of our lives." In re-examination he says expressly that he ordered the helm to be put hard-a-port after he had seen the green light. Q. Now, I want you to clear one thing which you answered in several ways, unfortunately. You have told me that you first saw the bright light?—A. I did. Q. And that you watched it for some time?—A. Yes. Q. Now, tell me—just take time to consider about it—did you order your helm hard-a-port before or after you saw the green light?—A. After I had seen the green light. Q. How long was it after you had seen the green light, that you ordered your helm hard-a-port?—A. About a minute, or perhaps not so much."

On examination of his evidence it does not appear that he was asked whether he gave two orders to port the helm, or only one. If he gave two orders to port the helm, one when he first saw the mast-head light of the "*Great Eastern*," and afterwards gave

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a second order to put the helm hard-a-port after he had seen the green light of the "*Great Eastern*," this would make his evidence on cross-examination and on re-examination consistent with his evidence in chief, which has already been referred to; and this appears to be the true solution of the apparent contradiction in his evidence. The clue to this solution is furnished by the evidence of *Verso*, the helmsman, whose evidence is quite positive and distinct on this subject:—Q. Was she sailing close-hauled?—A. Yes; close-hauled, laying north-west. Q. Do you remember shortly before the accident happened, getting an order from the officer of the watch?—A. Yes. Q. What was that order?—A. To port the helm. Q. Did you obey that order?—A. Yes. Q. Did you get any order from the officer?—A. Yes; hard-a-port a few minutes afterwards. Q. Did you obey the order?—A. Yes; and the mate assisted me in putting the helm hard-a-port."

This explains that the evidence of *Phillips* respecting the order given by him after seeing the green light applies to the second order he gave to put the helm hard-a-port, and which was subsequent to the former order he had given to the same effect, and it also explains other parts of his evidence which relate to the stamping for the Captain and assisting *Verso* to put the helm hard-a-port. It does not appear in his evidence that he anywhere says that he kept on his course until the green light of the "*Great Eastern*" was visible. In the preliminary Act, filed in pursuance of the Orders of *November*, 1859, the 12th article of the statement on behalf of the owners of the "*Jane*" is in these words:—"Upon the bright light being observed, and before the green light was

seen, the helm of the '*Jane*' was put hard-a-port." This statement was made 24th of *October*, 1863, within six weeks after the collision had taken place, and while the facts were fresh in the memory of the witnesses. It agrees with the evidence of *Verso*, and also with the evidence of *Phillips*, when so examined as to make it consistent with itself.

The conclusion to which their Lordships have come is, that the evidence given on behalf of the "*Jane*" is not inconsistent with the statement made on her behalf in the preliminary Acts, and that the case is taken out of the rules laid down in the cases of The "*Inflexible*" and The "*Vortigern*" referred to in the argument.

If the view which their Lordships have taken of the evidence on behalf of the "*Jane*" be correct, it establishes the fact that the course of the "*Jane*" was in violation of the 18th article of the new regulations, and this violation, in the opinion of the nautical gentlemen by whom they are assisted, has materially contributed to the collision which took place. These gentlemen are of opinion, that if the "*Jane*" had been kept on her course, hauling her a little closer to the wind and thereby diminishing her speed, instead of falling of and thereby increasing her speed and accelerating the rate of approximation to the "*Great Eastern*," the collision would have been avoided.

Their Lordships, therefore, have come to the conclusion that the "*Jane*" was to blame in this case.

Their Lordships, however, concur with the Court below in considering that the "*Great Eastern*" was to blame also. Without expressing any opinion on the point whether the look-out on the "*Great*

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*Eastern*" was or was not sufficient, their Lordships consider it to be proved that the lights of the "*Jane*" were properly fixed and brightly burning.

In truth, this seems scarcely to have been capable of being contested on the evidence adduced. If the "*Great Eastern*" had a proper and sufficient lookout, the port light ought to have been seen, unless the state of the weather rendered it impossible to do so. What the light was which was first observed by the "*Great Eastern*," assuming the evidence given on behalf of the "*Great Eastern*" to be completely accurate, it is difficult to explain. Their Lordships cannot admit the suggestion offered to them in argument, that it was the cabin light of the "*Jane*" seen from the "*Great Eastern*" impending over her just before the collision, and that it was first seen at the time when *Phillips* heard a bell on board the "*Great Eastern*," and when the two vessels were within hailing distance, and when *Phillips* was desired to port his helm, and answered that it had been hard-a-port a long time ago.

The evidence is distinct that the light was seen five minutes before the collision occurred. The evidence on both sides evinces that the way of the steamer was much diminished at the time of the collision, and that she was then going very slowly through the water. This is also confirmed by the evidence of the character of the collision. After they had struck, the "*Jane*" swung round under the starboard sponsons of the steamer, and, to use the expression of the mate of the "*Jane*," "then she rolled and smashed our ship up; the '*Great Eastern*' sponsons rolled into us." If the "*Great Eastern*" had not greatly diminished her speed, their Lordships are assured by

the nautical gentlemen that she would have gone right over the barque and away from her; and they are also assured, as indeed is sufficiently obvious, that if the first intimation of the proximity of the vessels had been at that time, when the occurrence of the collision was obviously unavoidable, it would have been impossible to have diminished the speed of a vessel of the size and momentum of the "*Great Eastern*" in the time which elapsed before they actually struck.

Their Lordships, however, are of opinion, that the collision was in a great measure attributable to the state of the weather and the rate at which the "*Great Eastern*" was proceeding, which was not, in the opinion of their Lordships, justifiable in the circumstances. The rate at which she was proceeding is stated in the Preliminary Act as twelve knots per hour; the evidence states that by the log it was fifteen knots, and after allowing two knots for the current produced by the paddle-wheels, the rate cannot properly be put at less than thirteen knots an hour, when the paddle-engines and the screw-engines were working full power, and every sail was set that could be set to accelerate her pace. At the same time the state of the weather was represented in the Preliminary Act, on behalf of the "*Jane*," to have been thick with showers of rain, and on behalf of the "*Great Eastern*," dark and raining. The witnesses on both sides state that it was a dark night, hazy weather, and that a drizzling rain was falling.

Their Lordships do not mean to lay down any rule beyond that expressed in the Regulations themselves as to the occasion when a steam-vessel is bound to

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moderate her speed, or as to the rate which in the circumstances described in the evidence she ought not to exceed; but their Lordships are of opinion, that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place. Here the evidence shows that from the moment the "*Jane*" was reported on board the "*Great Eastern*" everything was done to avert the collision, but without success. If the "*Jane*" had been wholly in the right, and by pursuing her course properly had been in the spot where the collision took place, the rate of speed at which the "*Great Eastern*" was advancing would have rendered their contact inevitable. Their Lordships are of opinion, that it was the duty of the "*Great Eastern*" to proceed at no greater speed than, having regard to the state of the weather, made it possible for them to avert the collision. Their Lordships, therefore, are of opinion that both vessels were to blame, and that the collision is attributable to both. That the "*Jane*," by not holding on her course when she first saw the masthead light of the "*Great Eastern*," got into a position which brought her directly against the "*Great Eastern*;" and that the rate of speed at which the "*Great Eastern*" was advancing made it impossible for her, when she first observed the "*Jane*," to avoid the catastrophe which occurred.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below be altered accordingly.

ON APPEAL FROM THE HIGH COURT OF  
ADMIRALTY OF ENGLAND.

BLIGH, HARBOTTLE & Co., the }  
owners of the cargo on board } *Appellants,*  
the "FUSILIER" - - - - }

AND

RICHARD SIMPSON AND OTHERS, }  
owners of the "AID," "NORTH- } *Respondents.\**  
UMBERLAND," "CHAMPION," }  
and "LOTUS" - - - - }

AND ALSO

THE OWNERS OF THE "FUSILIER" INTERVENING.

THE "FUSILIER."

THIS was originally a cause of salvage instituted by the Respondents, the owners, masters, and crews of

8th & 9th  
Feb. 1865.

\* Present: Lord Chelmsford, the Lord Justice Knight Bruce, and the Lord Justice Turner.

The words  
"persons be-  
longing to  
such ship" in  
the 458th  
section of the

Merchant Shipping Act, 1854, include passengers on board the ship, as well as the Master and crew; and who, in respect to remuneration for life salvage, stand on the same footing as the Master and crew.

The owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage.

The accident of the amount of salvage awarded exceeding the value of the salvage vessels is wholly immaterial, as the value of such vessels is not an element to detract from the value of the salvage service.

The appellate Court will not disturb an award of salvage by the Court below, on the ground of that Court having awarded too large a sum, unless they are satisfied, beyond all doubt, that the Judge has made an exorbitant estimate of the salvage services.

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the Steam-tug "*Aid*," the lifeboat "*Northumberland*," and the luggers "*Champion*" and "*Lotus*," against the ship "*Fusilier*," cargo and freight, and the Appellants the owners of the ship, and the owners of the cargo.

The appeal was brought from a decree of the Judge of the Admiralty Court (The Right Hon. Dr. *Lushington*), whereby the owners of the cargo were held liable to contribute to the remuneration awarded to the Respondents for salvage service in saving the lives of passengers on board the "*Fusilier*," and the question raised by the appeal was confined to that point.

The facts of the case were these :—

On the evening and night of the 3rd of *December*, 1863, a heavy gale was blowing in the Downs, from the north-west, and at about 6 p.m. signals were observed from the *Girdler* Tongue, and *Prince's* Channel light-ships, indicating that vessels were in distress in the vicinity. The Steam-tug "*Aid*" proceeded out of *Ramsgate* Harbour, at about 8.30 p.m. of that day, with the lifeboat "*Northumberland*" in tow, in the direction, in the first instance, of the *Tongue* light-ship, in search of the vessel or vessels in distress. After searching ineffectually, for several hours, in the direction indicated by those on board the *Tongue* light-ship, the Steam-tug, with the lifeboat in tow, proceeded to the *Prince's* Channel light-ship, and guided by the information then obtained, they discovered the "*Fusilier*" aground on the *Girdler* Sand, and by about 3 a.m. of the 4th of *December* they got alongside, and two men from the lifeboat boarded her.

The "*Fusilier*" was an emigrant ship, and had on board at that time ninety-five passengers, including

women and children, and a cargo of general merchandize. When the Steam-tug and lifeboat reached the "*Fusilier*," the Master and Pilot of that vessel requested them to take off the passengers, as fears were entertained for their safety, it being then about half flood, and very probable that the ship would break up on the next high water. Accordingly, the whole of the passengers were taken by the lifeboat from the ship and placed on board the Steam-tug, an operation which was safely performed by the lifeboat in four trips, occupying in the whole about four hours, and the lifeboat then returned and lay by the "*Fusilier*," for the purpose of saving the crew, if necessary. The Steam-tug left the vessel, with the intention of proceeding to *Ramsgate*, and the Captain of the "*Fusilier*" sent by her an order for an anchor and chain, to replace one which had been lost in the gale. The Steam-tug, shortly after leaving the "*Fusilier*," fell in with another vessel, the "*Demerara*," which was wrecked on the *Girdler* Sand, and the crew of which were in great peril; and she thereupon returned to the lifeboat, with the "*Fusilier's*" passengers still on board, and took her in tow to the rescue of the crew of the "*Demerara*." The whole of the crew of the "*Demerara*," nineteen in number, were saved by the lifeboat, and put on board the Steam-tug, and after performing this further service, the Steam-tug and the lifeboat proceeded to *Ramsgate* without returning to the "*Fusilier*." No further service was performed by the lifeboat, but her crew, or some portion of them, formed the crews or parts of the crews of the luggers "*Champion*" and "*Lotus*." At about 6 p.m. of the 4th of

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*December*, the "*Champion*" and "*Lotus*," with the anchor and chain on board, which had been ordered by the Master of the "*Fusilier*," left *Ramsgate* Harbour in tow of the "*Aid*," and reached the "*Fusilier*" about midnight; these vessels lay by her all that night. The next morning at daybreak the "*Aid*" went near the "*Fusilier*," and her Master reported that the anchor and chain were on board the lugger. Before this several Tugs had been sent to the assistance of the "*Fusilier*" by persons acting on behalf of the owners of the ship and cargo, and at the time when the "*Aid*" returned with the luggers, these Tugs were endeavouring to tow the "*Fusilier*" off the ground; and the "*Aid*," at the request of the Captain of the "*Fusilier*," sent her hawser on board and assisted in towing for a short time, when, finding the "*Fusilier*" could not be moved, the "*Aid*" was, by her own desire, cast off. The Master of the "*Aid*" then went on board the "*Fusilier*" and offered his services to take off some of the cargo, but was told that his assistance was not required; and the "*Aid*" then returned to *Ramsgate*. The luggers stayed by the ship until 4 p.m. of the 5th of *December*, when they were ordered to proceed to the *Nore* to wait till the weather should be finer, and the anchor and chain should be wanted; it having been determined to lighten the ship, it was not wished to encumber her with the additional weight of the anchor and chain. The luggers remained anchored at the *Nore* till the 10th of *December*, when the "*Fusilier*" was got off and brought up to *London* in tow of two steam-tugs. The luggers were towed up to *Blackwall*

on the 11th of *December*, at the expense of the "*Fusilier*," and they then discharged the anchor and chain, and returned to *Ramsgate*.

The value of the "*Fusilier*" and of her freight was £5,081, and that of the cargo, £52,000.

On this state of facts the owners of the cargo in the Court below contended, that no services were rendered to the cargo by the Respondents. And as to the services rendered in saving the lives of the passengers on board the "*Fusilier*," they insisted that the cargo was not liable to any claim for services in the nature of life salvage to passengers.

The cause was heard on the 14th of *June*, 1864, when the learned Judge delivered the following judgment :—  
 "Several questions of law have arisen respecting what is called life salvage, and to these questions I will address my attention before considering the particular facts of the case. First, then, as to the old law respecting salvage of life when not connected with the salvage of property—the law before any Statute was passed on the subject. There is, I apprehend, no doubt that the law was that where no ship or cargo had been salvaged, no property rescued from destruction, but lives had been saved from the ship, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. It is true that an anomalous case did sometimes arise, where one set of salvors exclusively salvaged life, and another wholly distinct salvaged the ship and cargo; but even in these circumstances the salvors of life alone could not

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render the property amenable to their claims. Then as to the case where life and property had both been salvaged by one set of salvors, it was the practice of the Court to increase the amount of salvage which would have been given if property only had been saved, and such doctrine does, I think, rest on too high authority to be doubted. The practice, too, was, that all the property salvaged should pay in such increased rate of salvage—the ship, the freight, and the cargo—each in proportion to its value. Such being the state of the law and the practice of the Court, the question arises, what was the grievance which required the interposition of the Legislature? That grievance clearly was, that persons who had risked their own lives, perhaps, and salvaged life only, or with so little property as not to afford the payment of an adequate reward, could not be justly compensated. That was the grievance intended to be remedied. No doubt the leading motive for a legislative enactment to remedy this grievance was to encourage the saving of life, but there was a subsidiary ground, the encouragement of salvors generally; for reward of life salvage operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose *a priori* that the remedy given by the Legislature would be commensurate to the evil and effect no further change. Of course, however, any such inference must finally depend on the words of the Merchant Shipping Act, 17th & 18th *Vict.* c. 104. This brings me to the consideration of the 458th section of that Act. That section begins by defining what constitutes a salvage service; it states three special heads, salvage services to ship, life salvage, and

salvage services to cargo, which, when occurring separately or in any combination, are to constitute a salvage service. The section then goes on to declare, that payment shall be made by the owners of the ship or cargo of a reasonable amount of salvage. Now, if the enactment ended here, I should say that the effect of it was simply to constitute the salving of life to be, *per se*, a salvage service, and to leave the mode of payment to be according to former practice ; for I cannot find any words in this section, adequate to effect so serious a change in the law as to abrogate all former authorities and practice, and introduce an entire new system of payment ; in effect, requiring the Court to depart from the ancient law which incidentally, where life and property were saved by one set of salvors, threw upon the cargo a part of the proportionate increase of the salvage reward given by reason of the salvage of life. The existing grievance was not the mode of payment, charging the cargo in part in such cases, but the absence of all payment for life salvage standing alone. I think that the old law was only altered, by this section, to the extent of making salvage of life alone a salvage service, to be paid, as in other cases, out of the whole property saved howsoever. I must resume this question, to a certain extent, when I come to the consideration of the 459th section ; but I think it would be most convenient, first, to dispose of all matters in dispute, arising with respect to the 458th section. It has been said that the words ‘in saving the lives of the persons belonging to such ship or boat,’ do not include passengers. If this argument be well founded, then it follows that the saving the lives of passengers is not to be paid for at all, either by the ship or cargo or otherwise ; or, in other

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words, that it does not constitute a salvage service; and that the Legislature, in defining what constitutes a salvage service, has omitted it. Consider this in two ways—first, by simply referring to the words of the section; secondly, by looking to the reasons of inclusion or exclusion. As to the words, the contention is, that the Master and crew alone are meant; but if the Master and crew alone were meant, why did not the Legislature express their intention in plain terms? Nothing could have been more easy; but they have not done so. This, at least, affords an argument that they had no such intention. The phrase 'persons belonging to such ship,' 'belonging' is certainly a phrase of *incipitis usis*, with reference to the subject matter; but one of the rules of construing Statutes, and a wise rule too, is, that they shall be construed *loquitur ut vulgus*, that is, according to the ordinary interpretation put upon the words by the mass of mankind, according to the common understanding and acceptance of the terms; and I think that nothing is more common than to say of passengers on board a ship, that they are 'persons belonging to the ship.' Upon these grounds alone I should hold that 'persons belonging to the ship,' included passengers. But I will look to the reason for this or for a contrary construction. The lives of passengers are surely as valuable as those of the Master and crew, and it does seem, *primá facie*, somewhat strange that the Legislature, in providing for salvage for saving life, should exclude this class of persons; for the object of the Legislature would surely be to save all, and not only a particular designation of persons. The more extensive also the construction, the greater is the reward, and the greater the encouragement to

encounter difficulty and danger; but a contrary construction would be, in effect, to say to the salvors, 'Never mind the passengers, carry off the Master and crew;' in other words, to offer an inducement to abandon life, instead of an inducement to save life—an inducement to save property instead—and this in direct opposition to all moral obligations, which I must consider, and am by law bound to consider, as the foundation of all legislation. I have no doubt, therefore, that passengers are included in this section. The question of payment I will determine when I have considered the 459th section. I do not hesitate to say that I have experienced doubt and difficulty in my endeavours to ascertain the true meaning of this 459th section. I will first observe that the word 'cargo' is not to be found in it. It is by inference only that the law relating to the payment of salvage by the cargo can be affected. That law must remain as it was, unless I can fairly arrive at the conclusion that the Legislature has intended to alter it, and has actually done so. This section requires that the owner of the ship shall pay salvage for life in priority to all other claims; and in case the ship is destroyed, or the value is insufficient, the Board of Trade may pay for the life salvage what it deems fit from the Mercantile Marine Fund. This enactment proves the anxiety of the Legislature that salvage for saving life shall always be paid, but it leaves it doubtful whether it was intended to alter the old law, or to supply what was wanting under the old law only—whether it was intended to throw the whole burden in all cases on the ship, or only to give priority of payment when the ship was the only fund to which recourse could

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be had. If the latter be the true construction, there would not be much difficulty in applying the Statute to the circumstances contemplated—namely, where besides life the ship alone was salved, and not any of the cargo. But if a contrary construction be adopted, and if the true construction is, that the cargo, though salved, should not contribute to life salvage, then the old law would be wholly altered, and the Court would have to consider, when life and ship and cargo had been salved—first, what is due for life salvage, and throw that burden exclusively on the ship, and then to assess the salvage on the ship and cargo. This construction would work a great change in the law, and go much beyond the grievance which existed, the want of reward for life salvage alone. For what reason should I put such a construction upon the Statute, a construction which would in its operation exclude all cargoes from contribution to life salvage? Not upon precedent certainly, for the practice has been to increase the amount of remuneration by reason of the salvage of life, when ship and cargo have been salved, and of that increase, in a very large proportion of cases, the cargo has borne the larger share; and, be it remembered, such precedents have the sanction of Lord *Stowell*. Then, if the cargo is not to be relieved from bearing its proportionate burden on precedent, how stands the case upon reason and principle? The claim, of course, can be preferred only against so much of the cargo as is salved, and it may be said, what interest have the owners of the cargo in the saving of the lives of the Master and crew, or the passengers? Why should they be tasked for the salving of life? Is it not sufficient for them

to pay for the salvage of their own property? *Prima facie*, this may appear to be a strong argument against charging the cargo with any contribution to life salvage. But let me examine it a little further. Is the payment of life salvage always founded upon the benefit reaped by the party who is called upon to pay? Both by this Statute, and by the law before the Statute, the owner of the ship might pay for life salvage when he reaped little or no benefit therefrom. By this Statute the owner of the ship must pay to the utmost of the little which may be saved. Salvors of life must be paid in priority, even where the life salvors and the salvors of the ship are different persons; and this, too, in cases where it might be very difficult to affirm that the owner of the ship was benefited by the saving the lives of the Master and crew, still less by the saving of the passengers. The sole ground, therefore, for charging the ship with the payment of the salvage for life, is not the actual benefit received in each individual case. Then, as to the cargo, assuredly it may be truly said that when the Master and crew are taken from the ship because of imminent danger, and the ship left without men to man her, such a proceeding cannot be held to be a direct benefit to the cargo; though, in some very exceptional cases, the removal of the passengers may be an advantage incidentally. Then why should the cargo contribute to life salvage? Not from any direct benefit, if that was the sole principle; but direct benefit is not the sole principle upon which salvage reward is required to be paid. I am of opinion that the payment of salvage depends upon much higher and general principles, and I think I am supported both by Lord *Stowell* and Mr. Justice

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*Story.* Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore ; salvage is governed by a due regard to the benefit received, combined with a just regard also to the general interests of ships and commerce. It is a political as well as a mercantile transaction—so say Lord *Stowell* and Mr. Justice *Story*—as for instance, when a larger reward is given, because of the greater value of the property saved. I conceive that the ship, the Master, the crew, the passengers, and cargo ought to be considered as one component firm, though each may differ in their respective conditions. I consider that all are interested in maintaining the great principle of adequate remuneration for salvors, though it may and must happen that sometimes the benefit conferred will be the saving of life only, sometimes the ship, sometimes the cargo ; and I think that none are more interested in the maintenance of this great principle than the owners and underwriters of the cargo, who must have the greatest pecuniary interest at stake. For these reasons I shall hold that, as relates to this particular case, the salvage of life, and of ship and cargo, there is nothing in the section mentioned, nor in the Statute, which alters the old law ; and I shall decree the salvage payable to be borne by the ship and cargo, as heretofore accustomed in similar cases. Having settled this principle, the remainder of my task is comparatively easy. I entertain no doubt that a case of life salvage was constituted by the circumstances proved ; in other words, that the passengers were saved from imminent peril. Who then are entitled to the character of salvors, and in what proportion should the salvage compensation be allotted ? Claims have been pre-

ferred on behalf the owners, Masters, and crews of the Steam-tug '*Aid*' and the lifeboat '*Northumberland*,' and also of the luggers '*Champion*' and '*Lotus*.'" The learned Judge, after stating the facts of the case, proceeded:—"The value of the property is £54,000. The principal salvors, no doubt considering for the moment that the services were all distinct, were the '*Aid*' and the '*Northumberland*,' and the persons on board them, they were the individuals who encountered the greatest risk and danger to life. Now, I shall give the salvage reward (for I am desired to distribute it) according to this principle, that the services of the '*Aid*' and of the '*Northumberland*' should be considered distinct services, and the crews on board entitled accordingly. I hope I make myself understood, because I am coming to the fact of the crew of the lifeboat having been transferred to the luggers. I shall consider the services of the luggers as distinct services. I shall allot a sum to them, as if some of the crew on board had not been previously concerned as salvors on board the lifeboat, the effect of which will be that some of the salvors will be entitled to share in two capacities. After much consideration, this is the only way in which, with justice to all parties, I can arrange this matter. I shall give the sum of £700 to the '*Aid*,' and the same to the lifeboat. I hold that the services of the luggers were not attended with the same danger, or anything like it; but they were of very long duration. The luggers themselves and the crews were detained from the 4th to the 14th of *December*, and I shall give to those two luggers the sum of £800, especially on the ground of their long detention. I apprehend I have now dis-

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charged my task ; for I trust I shall not be asked to further distribute the sums I have awarded."

The owners of the cargo appealed from this decree. The owners of the ship, although content to abide by the decree, as the owners of the cargo were decreed to contribute according to its value, yet as the owners had appealed, and the result of that appeal might leave the entire sum of £2,200, to be satisfied out of the ship and freight, intervened in the appeal.

The Queen's Advocate (Sir *R. Phillimore*, Q.C.), and Mr. *Potter*, for the Appellants, the owners of the cargo.

Two questions arise. First, whether the owners of the cargo, are liable to contribute rateably with the owners of the ship, to the whole sum awarded in respect of the services rendered by the salvors, a large part of that sum having been awarded as a remuneration for the services rendered in saving the lives of the passengers on board the "*Fusilier* ;" and secondly, as to the amount of remuneration awarded to the luggers, the "*Champion*" and "*Lotus*," in respect of the services rendered by them, which we submit is excessive.

First, we contend, that the owners of the cargo are not liable to contribute for life salvage alone. Previous to the passing of the Merchant Shipping Act, 1854, the Court of Admiralty had no power to award remuneration where life alone had been saved. It was only where property also had been rescued from destruction that the Court could take the salvation of life into consideration. The "*Johannes*" (a); *Abbott on Shipping*,

(a) *Lush*. 182.

p. 504 [10th edit.]. The question, then, must be decided by a strict construction of the words of the Merchant Shipping Act, 1854, secs. 458 and 459. By section 458, salvage is to be allowed in these instances: first, in assisting a ship or boat; secondly, in saving the lives of persons belonging to such ship or boat; and thirdly, in saving the cargo, &c., of such ship. By section 459, the owners of the ship or boat alone are liable to pay for life salvage. That section enacts that "salvage in respect to the preservation of the life or lives of any persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority of all other claims for salvage;" and then it provides that, if the fund is insufficient properly to remunerate the salvors, recourse is to be had to the Mercantile Marine Fund, but it nowhere mentions that the cargo is to be liable for life salvage. The "*Westminster*" (a) illustrates this point, that if the cargo requires assistance to remove it to a place of safety it assumes the character of salvage service. There is no mention in these sections of the liability of the owners of the cargo to contribute to the sum to be awarded for saving passengers' lives, as in the Statute, 9th & 10th Vict. c. 99, secs. 19 & 20. A palpable distinction exists between saving the lives of passengers and those of the Master and crew of the vessel. Passengers cannot be construed to be "persons belonging to any such ship or boat" within the meaning of the 458th and 459th sections. The "*Vrede*" (b) is a strong case in support of this view. There it was held that passengers, rendering services to a ship, where there is extraordinary danger, may be entitled to salvage reward, which would not be the case if they are to be

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(a) 1 W. Rob. 220.

(b) Lush. 322.

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considered as "belonging to the ship." The same rule with respect to salvage services by passengers has been applied by the Courts in *America*. *Toule v. The Great Eastern* (a).

Secondly. As to the claim of the luggers, the "*Champion*" and "*Lotus*," we submit, that no salvage service was rendered by either of them, and the Court below improperly awarded them, in distributing the £2,200 among the classes of salvors, a sum greatly disproportionate to their services. They incurred no risk at all. In fact, the sum awarded exceeded the value of the luggers themselves.

Mr. *Manisty*, Q.C., and Mr. *V. Lushington*, for the owners of the "*Fusilier*."

According to the previous practice of the Court of Admiralty, the principle was to enhance the amount of salvage where life was preserved against the cargo as well as the ship and freight, and under the provisions of the Merchant Shipping Act, 1854, secs. 458-9, the owners of the cargo were liable, and the judgment of the Court below on that point is correct and according to law.

Dr. *Deane*, Q.C., and Mr. *Clarkson*, for the Respondents, the Salvors.

On both grounds on which the judgment of the Court below is impeached by the Appellants, we submit that the Court was right. According to the sound construction of the 458th and 459th sections, it was clearly intended that passengers should be included, and salvors entitled to salvage for saving passengers' lives, and that the owners of the cargo should contribute rateably in payment of the sum awarded for such life salvage. Although owners of the cargo are not expressly men-

(a) 11 L. T. N. S. 516.

tioned in the 459th section, yet the 468th and 469th sections, providing for the manner of enforcing payment of salvage, embracing the three classes of salvage enumerated in section 458, expressly mentions "owners of cargo" as liable. As to the objection with respect to the value of the luggers, it is of no weight. The luggers did all that was required. They got the anchor and chain, and stood by to give effectual service if called on. In The "*Undaunted*" (a) it was held, that efforts to give assistance to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship be otherwise saved.

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The principal question raised upon this appeal is, whether by the 458th and 459th sections of "The Merchant Shipping Act, 1854," the owners of the cargo of a vessel to which salvage services have been rendered, are liable to contribute to that portion of the claim of the salvors which arises from the saving the lives of the passengers on board the vessel. There was another subordinate question, as to the amount of salvage awarded to some of the salvors, which will require a short notice.

It is unnecessary to state the facts of the case, which were all agreed to on both sides. The Appellants, the owners of the cargo on board the "*Fusilier*," the vessel saved, admitted that the owners, Masters, and crews of the different vessels to whom salvage was awarded, were entitled to remuneration for their services. The value of the ship was £2,500, of the freight £2,581 17s. 8d., and of the cargo £52,000. The learned Judge of the Court of Admiralty pro-

(a) Lush. 90.

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nounced the sum of £2,200 to be due to the salvors for the salvage services rendered by them to the vessel "*Fusilier*" and her cargo, and for their services in saving the lives of the passengers on board that vessel, namely, to the Master, owners, and crew of the steam-tug "*Aid*," the sum of £700; to the Master, owners, and crew of the lifeboat "*Northumberland*," the sum of £700; and to the Masters, owners, and crews of the luggers "*Champion*" and "*Lotus*," the sum of £800, together with costs.

The services rendered by the luggers were these: On the 3rd of *December*, 1863, the "*Fusilier*" was aground on the *Girdler Sand*. The Steam-tug the "*Aid*" and the lifeboat the "*Northumberland*" had been rendering assistance, and had succeeded in taking all the passengers out of the "*Fusilier*" and placing them in safety on board the "*Aid*," to be conveyed to *Ramsgate*. The "*Aid*" received an order from the "*Fusilier*" to bring an anchor and chain from *Ramsgate*, to be used in getting her off the sand. The weight of the anchor and chain procured for this purpose was found to be too great for the "*Aid*," and it was necessary to employ the two luggers, the "*Champion*" and the "*Lotus*," to carry them off to the "*Fusilier*." These vessels anchored near the "*Fusilier*" at midnight of the 4th of *December*, and remained by her the whole night. On the following day, unsuccessful attempts were made to tow the "*Fusilier*" off the sand. In the course of the afternoon of the 5th of *December*, the gale, which had been blowing from the westward, changed to the southward, thereby lessening the chance of the "*Fusilier*" being got off the sand, and the luggers were ordered to proceed to the *Nore*, and remain there till the weather moderated. They

remained at the *Nore* from the 6th to the 10th of *December*; then, according to instructions, they returned to the "*Fusilier*," which, not being sufficiently light to float, although part of her cargo had been removed, they were ordered back to the *Nore*, still with the anchor and chain on board; and the "*Fusilier*" having been got off the sand on the 11th of *December*, they followed her to the *Blackwall* Docks, and finally arrived at *Ramsgate* on the 14th of *December*. The Appellants objected that the amount of £800, awarded to the "*Champion*" and the "*Lotus*" for their services was excessive, and urged as proof of the excess, that it exceeded the value of the two vessels.

Their Lordships would always be slow to disturb an award of salvage by the learned Judge of the Court of Admiralty on the ground of his having given too large a sum to the salvors, unless they were satisfied, beyond all doubt, that he had made an exorbitant estimate of their services. The accident of the amount of salvage exceeding the value of the vessels is wholly immaterial. Undoubtedly, the placing valuable property in peril may enhance the merit of salvage services; but it does not follow, on the contrary, that the trifling character of the property endangered will necessarily detract from the value of such services. It was not quite correctly said in argument at the Bar, that what is risked is the first thing to be regarded, and the next the services which are rendered. It would have been more accurate to have reversed the order of these considerations, and to have said that the first thing to be regarded is the value of the services with reference to the amount of property rescued from peril; and the next, how far the merit of these services is

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enhanced by the risk to life or property which has been involved in them. Taking the grounds of claim to salvage in this order, it is obvious that it never can be an argument against the amount awarded to the salvors, that it exceeds the value of their property put in peril by the service. And, even if such an argument could ever be urged, it hardly belongs to the Appellants in this case. No complaint was made by them of the total amount of salvage awarded to the salvors in one entire sum of £2,200. It is only in the distribution of this sum amongst the different classes of salvors that there is any opening for their objection. Now, the award of salvage is not of such a sum to one set of salvors, and such a sum to another, making a total of £2,200, but of that sum as the whole value of the salvage services, which is afterwards apportioned amongst them, according to their respective merits. The amount allotted to the "*Champion*" and the "*Lotus*" might be made the subject of dispute by the owners and crew of the other vessels, but it can hardly be objected to by the Appellants, who have never once suggested that, taking into account the value of the property rescued from peril, and the number of lives saved, the sum of £2,200 was too great a reward for the whole of the services rendered. There is, therefore, no valid objection to the decree upon this ground.

The principal question in the case is one of great importance, and of some difficulty. Prior to the passing of "The Merchant Shipping Act, 1854," the Court of Admiralty, in a case of salvage where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well established practice

of the Court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property. Of course, as the salvage was awarded in one entire sum, the owners of the cargo, as well as of the ship and freight, contributed their proportion to the payment of this increased salvage, and so in a certain sense were rendered liable to the payment of what is called life salvage.

Before the passing of "The Merchant Shipping Act, 1854," the Legislature had provided for the payment of a reward or compensation by way of salvage for the saving of the life of any person on board a ship or vessel in distress, by the 19th & 21st sections of 9th & 10th *Vict.* cap. 99, "An Act for Consolidating and Amending the Laws relating to wreck and salvage." The provisions of these sections are substantially re-enacted in "The Merchant Shipping Act, 1854," and, therefore, need not be further noticed.

In construing the 458th and 459th sections of the Act on which the principal question arises, the recognized practice of the Court of Admiralty of indirectly rewarding salvors for the saving of human life by giving an increased rate of salvage on that account, must always be borne in mind. The Legislature, in dealing with the subject of life salvage, must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly. And it must also be remembered that, by the established practice of the Court, the owners of cargo were always rendered virtually contributory to the reward and compensa-

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tion given to salvors for the preservation of life. Under these circumstances the provisions in the sections in question were introduced.

The 458th section is in these terms:—"Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,—(1.) In assisting such ship or boat; (2.) In saving the lives of the persons belonging to such ship or boat; (3.) In saving the cargo or apparel of such ship or boat, or any portion thereof; And whenever any wreck is saved by any person other than a Receiver within the United Kingdom; there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned."

It is perhaps hardly necessary to advert to a point which was raised in the Court of Admiralty, but barely mentioned here, and certainly not insisted upon, that the persons saved being passengers on board the "*Fusilier*," were not, in the terms of the Act, "persons belonging to such ship." It would be strange indeed if an Act intended to encourage and reward the saving of life which is in peril in consequence of the distress and danger of the vessel in which it is embarked, should be construed so as to

make a distinction between those who were on board in different capacities and different relations to the vessel. It is a sufficient answer to such an objection to say that nothing is more common in popular language than to speak of "the passengers belonging to such a vessel." The salvors, therefore, are entitled to a reasonable amount of salvage for the services rendered in saving the lives of the passengers on board the "*Fusilier*," and the only question to be considered is whether the owners of the cargo are liable to contribute towards its payment.

The general rule as to the parties liable to pay salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress, would be of any benefit, either to the vessel or to the cargo. The Legislature, therefore, could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is, that there should be included in the entire sum payable for salvage of ship and cargo, a distinct reward for the preservation of human life. It was argued on behalf of the Appellants that when the 458th section, after describing the services to be rendered in assisting the ship or boat, in saving the lives of the persons belonging to the ship or boat, and in saving the cargo or apparel of the ship or boat, goes on to say, there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, a reasonable amount of salvage, the words must be read *reddendo singula singulis*. But, although this might

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very well be if the section had confined the claim of salvage to the saving of the ship and cargo and apparel, for then each species of property benefited would alone have been chargeable, yet where, amongst the other subjects of claim, the saving of human life is included, there is no reason why that should be referred to the ship any more than to the cargo, since the one derives no more benefit than the other for services rendered. The Legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach, without any distinction, upon all the owners of property exposed to the common danger. And as the salvage is always awarded in a gross sum, and under this section is to be increased by the reward for the saving of life, the owners of cargo since the Act are liable exactly to the same extent as before, with this immaterial difference, that there now is a distinct and express item of claim to increase the amount of salvage to which they are contributory, instead of the whole being estimated upon a higher scale. But it is said that the 459th section of the Act shows that it must have been intended by the Legislature that the owners of the ship should alone be liable to the payment of life salvage, for it enacts that "salvage in respect to the preservation of the life or lives of any person belonging to any such ship or boat shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay

the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives, out of the Mercantile Marine Fund, such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." There is no doubt that this section creates some difficulty as to whether the Legislature intended that life salvage should be payable by any other persons than the owners of the ship, but if such was the intention it would have been easy to have expressed it, and the language of the section is capable of the construction that it merely fixes the limit of the shipowner's liability, and does not mean to render him solely liable to the payment of this description of salvage. And whatever doubt may be thrown upon the subject by this section, there are two subsequent sections of the Act, the 468th and the 469th, which appear to be susceptible of no other interpretation than that the owners of cargo were intended to bear a proportion of the payment for life salvage. The 468th section enacts, that "Whenever any salvage is due to any person under this Act, the Receiver shall act as follows (that is to say): If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof, he shall detain such ship or boat, and the cargo and apparel belonging thereto, until payment is made, or process has been issued by some competent Court for the detention of such ship, boat, cargo, or apparel." It is thus expressly provided, that in the case of salvage being due for services rendered in saving the lives of persons belonging to the ship, the cargo shall be detained. And it

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is not intended that it shall be merely held as additional security with the ship for payment of the salvage, for the 469th section enacts, that "Whenever any ship, boat, cargo, apparel, or wreck so detained by any Receiver for non-payment of any sums so due as aforesaid" (that is, amongst others, for services rendered in saving the lives of persons belonging to the ship); the Receiver in certain cases may sell "such ship, boat, cargo, apparel, or wreck, or a sufficient part thereof, and out of the proceeds of the sale" defray all sums of money due in respect of salvage. Whatever difficulty, therefore, may be supposed to be created by the 459th section, it seems impossible to read the two last-mentioned sections without being satisfied that they proceed upon the ground of the owners of cargo being liable to the payment of life salvage. The object of the Legislature in the different sections referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life, by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril, more than on another. Their Lordships, after much consideration, have arrived at the same conclusion with the learned Judge of the Court of Admiralty, and they will, therefore, humbly recommend to Her Majesty that the decree appealed from be affirmed, and that the appeal be dismissed with costs.

ON APPEAL FROM THE HIGH COURT OF  
ADMIRALTY OF ENGLAND.

WARREN HASTINGS ANDERSON, }  
Commander of Her Majesty's } *Appellant,*  
Gunboat "Flying Fish," - - }

AND

ADRIAN HOEN AND OTHERS - - *Respondents.\**

THE "FLYING FISH."

A CAUSE of damage brought by the Respondents, 3rd, 4th, 6th,  
the owners of the Dutch vessel "*Willem Eduard*," 7th & 8th  
the owners of the cargo on board, and the Master and Feb. 1865.

\* Present: Lord Chelmsford, the Lord Justice Knight Bruce,  
and the Lord Justice Turner.

A collision  
took place in  
the Channel  
by Her Ma-  
jesty's Gun-  
boat *F. F.*

running into a sailing vessel, and in consequence of the injury she received, the Master ran the vessel ashore. Though assistance was repeatedly offered, and the Master was informed that the vessel could be got off, he made no effort to save the vessel, but refused all assistance, and the vessel afterwards stranded and broke up. Held by the Judicial Committee, that as the vessel was not in such a state that all attempts to save her were hopeless, the Master displayed such a want of nautical skill and neglect of duty that the *F. F.* was responsible only for the damage directly occasioned by the collision, and not for that which subsequently occurred after the refusal of the assistance offered.

Held further, that it was unnecessary to show that such subsequent damage arose from gross nautical ignorance on the part of the Master, as it is sufficient that there was a want of ordinary nautical skill and resolution.

The new rules made, pursuant to the Statutes, 3rd & 4th *Vict.* c. 65 & 66, and the 17th & 18th *Vict.* c. 78, do not restrain the Judge of the Admiralty Court from admitting in his discretion, fresh evidence when the case comes before him upon objections to the report of the Registrar and Merchants upon a reference to them to ascertain the amount of damage.



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crew, for their private effects on board, against the Appellant, the Commander of Her Majesty's Gunboat the "*Flying Fish*."

The collision out of which the cause arose happened on the 30th of *November*, 1861, in the English Channel, when the "*Flying Fish*" ran into the "*Willem Eduard*," and in consequence of the damage the "*Willem Eduard*" received she was run ashore, abandoned, and she afterwards broke up.

No question was raised as to the Appellant's liability for the damage directly occasioned by the collision, the only point being whether, in estimating the value of the ship, he was liable for the subsequent damage occasioned by the negligence of the Master of the "*Willem Eduard*," in refusing assistance to get the vessel off the shore before she broke up.

The evidence and the grounds of the argument are fully stated in their Lordships' judgment.

The appeal was argued by

The Queen's Advocate (Sir *R. Phillimore*, Q.C.), the Admiralty Advocate (Dr. *Twiss*, Q.C.), and Mr. *Phinn*, Q.C., for the Appellant; and by

Dr. *Deane*, Q.C., and Mr. *Brett*, Q.C., for the Respondents.

8th March,  
 1865.

Their Lordships' judgment was reserved, and now delivered by

LORD CHELMSFORD:

In this appeal no question has been raised as to the Appellant's liability for damages arising from the collision, which was the subject of the action, but he

objects to the decree of the Judge of the Court of Admiralty, so far as it renders him liable to a portion of the damages, which he contends was the result, not of the collision itself, but of the absence of nautical skill on the part of the Master of the Respondents' vessel, in making no effort to rescue her from the peril in which she was placed by the immediate consequence of the collision, and of his want of prudence and judgment in refusing assistance which was offered to him, and which, if it had been accepted, would probably have prevented all the damage which afterwards ensued.

The collision happened about twenty minutes past 9 P.M., 30th of *November*, 1861, in the English Channel, off *Hastings*, by Her Majesty's Gunboat "*Flying Fish*," of which the Appellant was Commander, running with her stem and port bow into the port quarter of the Respondent's vessel, the "*Willem Eduard*." It is admitted that the blame of this collision must be attributed solely to the Appellant. The effect of the blow received by the "*Willem Eduard*" was that a hole was made in her stern about five or six feet above the water line, and the steering gear was disabled. The Master believing that the vessel was making water, and was in danger of sinking, rigged a temporary steering apparatus, and stood in for the land, which he reached at about midnight, and ran her ashore three miles from *Rye* Harbour. The tide was then about half ebb. The night was dark, the wind being W.S.W., and the weather cloudy and squally. The coastguard, who were on duty at a station near *Rye*, being desirous of rendering assistance, and the surf on the beach being heavy, carried their boat and launched it abreast of the vessel, and

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got aboard of her about 2 o'clock on the following morning. *Attersoll*, the chief boatman, in the presence of *Tremble*, a commissioned boatman of the coast-guard, told the Master of the "*Willem Eduard*" that he was three miles from *Rye* Harbour, that where his vessel was lying was sand and no rocks, and that if he would give him charge of her he had no doubt that he could get her safe into *Rye* Harbour. But the Captain refused this offer, stating, "It would be of no use trying." *Attersoll* then asked to be allowed to get out an anchor, but the Master said "No." He then inquired what he intended to do; the Captain replied, "It is no use, the wind will be from the south-west, and the ship will go to pieces." *Attersoll*, after waiting some time longer to see if the Master would allow him to do his best to get the vessel into a place of safety, at about 3 o'clock got over the side of the vessel, and walked ashore, the tide having ebbed and left her high and dry. After *Attersoll* quitted the vessel, *Tremble*, who stayed behind, pointed out to the Master that the wind was two points off the land, and that they could get the vessel off, she being three miles to windward of the harbour, but "he still refused to let them try." *Attersoll* returned to the vessel at 4 o'clock, when he and *Tremble* procured a light and walked round the vessel, which was still dry, and all the damage they could discover was on her stern and quarter, about five or six feet above the water line; and they asked the Master to give them some canvas and nails, for the purpose of nailing the canvas over the damaged part, which he refused to do. When *Attersoll* got on board again, he asked the Master what he intended doing, and he answered, "The vessel will go to pieces."

And upon *Tremble* proposing to get her port anchor out, he replied angrily. "No anchor—no good." At 5 o'clock the tide began to flow, when Mr. *Groom*, the Receiver of wreck for the port of *Rye*, and Mr. *Buck*, the chief officer of the coast-guard station, went alongside the vessel, and repeatedly urged the Captain to accept the services of the coast-guard men, but he still refused all offers of assistance. At 5 o'clock the Captain and the crew left the vessel, the men carrying their clothes and chests with them, and the Captain taking away his chronometer. As the tide rose the vessel floated, and a little before 7 o'clock the port wing of the foresail and gaff of the fore-trysail not being properly brailed up, the wind caught these sails, and carried the vessel on to the beach. As she was driving in to the beach the mainmast went overboard. At 7 o'clock, after the vessel was on the beach, there having been no one on board from 5 to 7 o'clock, and nothing having been done during that time, the Captain said the coast guard might try their best, and he gave charge of the vessel to them, but it was then too late for any effectual services to be rendered.

When the vessel was seen about half-past 9 she was lying broadside on to the land, full of water, and the sea breaking over her. She afterwards went to pieces on the beach, and the greater part of her cargo was destroyed. The total value of the ship and cargo was £10,910. 11s. 8d. The net proceeds of the sale of the wreck and cargo was £2,623. 13s. 2d. Upon the hearing of the cause the learned Judge, assisted by two of the Elder Brethren of the Trinity House, pronounced for the damage sued for, and referred the question of amount to the Registrar, assisted by merchants, to report upon. The Respondents, before the

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Registrar and Merchants, claimed compensation for a total loss, amounting to £8,286. 18s. 6d., after giving credit for the net proceeds of the sale of the wreck, and of the cargo recovered. The Appellants denied their liability for the damage consequent upon the refusal of the Master to accept the services of the coast-guard. No affidavits were used by the Respondents, nor were any witnesses produced by them before the Registrar and Merchants; but they relied entirely upon the written evidence filed in the cause. On the part of the Appellant six witnesses were examined, all of whom had been present when the services of the coast guard were tendered and refused, and they were cross-examined on behalf of the Respondents. The Registrar reported that he was of opinion, for the reasons which he set forth in an exhibit to his Report, that there was due to the Respondents in respect of the damage proceeded for the sum of £1,110, together with interest thereon at 4 per cent. The reasons for this opinion were stated to be that the Master showed both a great want of ordinary nautical skill in not taking any measures to save the vessel before the tide rose, and gross neglect of duty in not accepting the services of the coast-guard men; that, therefore, the damages to which, in the opinion of the Registrar and Merchants, the Respondents were entitled were, first, the cost of the repairs to the vessel at the port to which she might have been taken, including the discharge and re-loading of the cargo, and the demurrage and port charges, which they estimated at the sum of £610; and secondly, a reasonable sum for the services of the coast guard, and of the Steam-tug in rescuing her from the shore, and taking her to a port of safety;

and as the whole value of the ship and cargo was estimated by the owners at £10,910, they thought that £500 would have been a proper remuneration to the Salvors for their services.

This Report was objected to on the part of the Respondents, and they filed a petition praying the Judge to refer it back to the Registrar for amendment, and the Appellant filed an answer praying the Judge to confirm the report. At the hearing of this petition the Respondents proposed to produce witnesses who had not been examined before the Registrar and Merchants. This was objected to on the part of the Appellant, but the learned Judge overruled the objection, and five new witnesses were produced by the Respondents. One witness who had been examined before the Registrar and Merchants was produced and examined by the Appellant.

The Judge by an Order referred back the Report to the Registrar assisted by Merchants, for amendment, condemned the Respondents in the costs incurred at the reference before the Registrar and Merchants, but made no order as to the costs incurred by the objection to the Report. The learned Judge was of opinion, "that the Appellant had not substantiated his allegation, that a large part of the damage was not to be attributed to the collision, but was solely occasioned by the Captain's refusal to accept assistance. That to establish that defence, it ought to have been shown, not only that the Captain did refuse assistance as a matter of fact, but that such refusal arose from gross want of nautical knowledge, or *crassa negligentia*. That the true issue in the case was not whether the assistance of the coast guard, or others, and the laying out of the anchor, might have been successful, but it

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was, whether there was such reasonable doubt on the part of the Master who refused the adoption of such measure, that he was justified in declining to run the risk ; or, putting it in other words, whether looking to the condition of the ship, the cargo, the weather, and the locality, he was guilty of gross nautical ignorance or gross negligence." The learned Judge stated that " had the case come before the Court solely upon the evidence produced before the Registrar and Merchants, he thought it most probable, indeed he entertained little doubt, that the Court would have come to the same conclusions, as to matters of fact, as they did." But after adverting to the evidence of the witnesses produced by the Respondents on the hearing of their petition, he added, " with this evidence before me is it possible for me to come to the conclusion that the Captain was guilty of gross nautical ignorance, or of gross negligence ? " and he concluded by expressing his opinion that, as " against a wrong-doer, which, in legal estimation, the '*Flying Fish*' must be taken to have been, it could not be maintained that there was no reasonable doubt as to the course to be pursued."

Upon the hearing of the appeal from this judgment, two points were insisted upon by the Counsel for the Appellant : first, that the learned Judge ought not to have received fresh evidence upon the objection to the Registrar's Report ; and, secondly, that such evidence was not sufficient to lead to a decision contrary to such Report. As to the admission of additional evidence, the Counsel for the Appellant did not attempt to maintain that the learned Judge had no power to admit such evidence, but they contended that he thereby exercised his judicial discretion im-

properly. And they referred to former expressions of opinion of the same learned Judge strongly condemnatory of the course of withholding evidence at the reference, and making a new case before the Court, particularly in the cases of the "*Sir George Seymour*" (1 Spinks' Adm. Rep., p. 67), and the "*Glenmanna*" (Lush. Adm. Rep., p. 122). They also insisted that the new rules made in pursuance of the Acts of the 3rd & 4th *Vict.*, caps. 65 & 66, and the 17th & 18th *Vict.*, c. 78, which came into operation on the 1st of *January*, 1860 (*a*), had introduced a new practice with respect to references before the Registrar, had armed him with more authority in conducting the inquiry, and had enabled the Judge to know the oral evidence taken before the Registrar by a transcript of the shorthand writer's notes, and, therefore, had considerably limited the discretion previously exercised as to admitting additional witnesses. Their Lordships do not think that these rules have at all the effect of restraining the power of the Judge, or of fettering his discretion as to the admissibility of fresh witnesses upon these occasions, a discretion which it is unnecessary to say must always be exercised with great caution, and with a careful regard to the peculiar circumstances of each case.

With respect to the value of the evidence produced before the learned Judge upon the hearing of the objection to the Registrar's Report, it must be observed that not one of the five witnesses who were called saw the "*Willem Eduard*" until she was on the beach, and at a time when it is admitted by all the Respondents' witnesses that it was too late to do anything to save her. Although, therefore, they are witnesses

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(a) See these rules, Lush. Adm. Rep. App. xix.



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of perfect respectability and of competent experience, and although they express themselves with great confidence as to the impracticability of saving the vessel in the place where she first grounded, yet it is impossible to give as much weight to their conjectures (for they amount to nothing more) as to the evidence of the Appellant's witnesses, persons also of skill and experience, who saw the vessel where she was first lying, and who formed their judgment of the measures to be adopted upon the spot, and with the best opportunity of judging whether they were likely to be successful.

Taking, however, the whole of the evidence on both sides into consideration, can it be said that the conduct of the Captain of the "*Willem Eduard*," after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill, and a gross neglect of duty? The learned Judge thought that in order to exonerate the Appellant from liability to the subsequent damage to the vessel it was necessary to show that the Captain was guilty of "gross nautical ignorance, or of gross negligence."

It appears to their Lordships, that the principle upon which the owners of a vessel are to be exempted from liability for the acts or omissions of their Master is not here laid down with perfect accuracy. The blame imputed to the Captain of the Respondents' vessel in this case is, that he made no effort to save her, and that he refused all offers of assistance which were made to him; and the proper question seems to be whether in so acting he did, in the words of Baron Parke in *Tindall v. Bell* (11 Mee. & Wells, 232), "what a reasonable man would do under similar circumstances, where he had no other judgment but his

own to resort to ;" or in the words of the learned Judge of the Court of Admiralty himself, in the case of The "*Linda*" (Swab. Adm. Rep. 306), upon a question of abandonment, "whether the Master had wilfully abandoned his vessel, when he might have saved her, or that he had abandoned her through a want of ordinary nautical skill and resolution." It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel, and the Captain had some hours to decide what course was best to be adopted. The learned Judge was of opinion that "as against a wrong-doer, which," he says, "in legal estimation the '*Flying Fish*' must be taken to have been, it cannot be maintained that there was no reasonable doubt as to the course to be pursued." But treating the "*Flying Fish*" as a wrong-doer is really begging the whole question. For the collision, and for all the consequences of that collision, the Appellant is responsible. But if the subsequent damage resulted from the acts or omissions of the Captain of the "*Willem Eduard*," for that portion of the damage the Appellant is not only not a wrong-doer, but he is not even to be regarded as the doer of the act which occasioned it. It is quite true, as the learned Judge has said, that "if there was a reasonable doubt on the part of the Captain whether the measure proposed, or any other measure, would have been successful, he was justified in declining to run the risk, and would not be guilty of nautical ignorance or gross negligence." But the Captain appears to have exercised no judgment at all

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in the matter, but at once to have abandoned himself to despair, and to have regarded all efforts to save the vessel as hopeless. He seems from the first to have formed an erroneous notion of the extent of the injury she had sustained from the collision. He says that he ran her aground because after she had been struck by the "*Flying Fish*," he found she was making water very fast, and was in danger of foundering. And yet *Attersoll*, the coast-guard man, says, that when he was on board, two hours after she was aground, he asked the Captain "if she made any water," and he answered "No." And *Tremble*, another of the coast-guard men, says that the Captain told him she was not leaking. To reconcile these different statements, the Counsel for the Respondents allege that though the vessel made water while they were running to the shore after the collision, yet when the vessel was high and dry on the sand the water ran out of her. But this explanation can hardly be accepted, because if she was so shaken by the collision, as the suggestion assumes, the vessel would have made water again while she was drifting to the beach; and yet after she arrived at the beach the well was sounded and there was no water in her, and the lee bilge (that is, the bilge on the side that was lying over) was examined, and no water was found there.

The vessel, therefore, was clearly not in a state in which all attempts to save her were hopeless, and this must be taken into account in considering whether the Captain really exercised his judgment at all in the matter. Offers of assistance were made to him as early as two in the morning; he said it was of no use, "the wind will be from the south-west, and the vessel will go to pieces." He was asked at four

o'clock for a piece of canvas to nail over the hole above the water-line; he refused to give it. At five o'clock offers of assistance were repeatedly made to him, which he as repeatedly refused. All this time he appears not to have been doing, or attempting, or suggesting, anything to save the vessel, and at five o'clock he and the crew abandoned her without leaving a soul on board, and some of the sails not properly brailed up, and thus, when the vessel floated, the wind catching these sails carried her in three hundred or four hundred yards, and she again grounded on the beach. These circumstances furnish a strong ground for believing that if the offered assistance had been accepted, it might have been successful. There were two modes suggested by which attempts to save the vessel, or at all events the cargo, might have been made: one by carrying out anchors and holding the vessel till she floated, and then, with the assistance of a tug, carrying her into *Rye* harbour; the other, as suggested by one of the witnesses for the Respondents, to have forced her farther on the shore. Whether either of these modes would have been successful it is impossible to do more than conjecture, though the witnesses for the Appellant speak very confidently of their expectation of success in their proposed experiment. But, however this may be, the Captain of the "*Willem Eduard*" never seems to have considered, even for a moment, any plan suggested to him, nor to have turned his own mind to the thought of how the vessel might be saved, but, at once resigning himself to his fate, he abandoned her to the mercy of the winds and waves, by which she was helplessly carried to her destruction. Under these circumstances it is impossible for

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their Lordships to arrive at the conclusion that the Captain exercised any judgment at all upon the possibility of saving his vessel. It appears that he attempted nothing because he had persuaded himself that nothing could be done, and that he rejected all offers of assistance, not after weighing the measures proposed, but because he had hastily determined that the state of his vessel would make every effort to save her unavailing. Their Lordships, therefore, agree in the conclusion to which the Registrar and Merchants arrived, as to the Captain having shown want of ordinary nautical skill and neglect of duty, and they think that the witnesses produced before the Judge by the Respondents did not alter the case, and that the learned Judge ought to have confirmed the Report so far as it limited the damages to the immediate consequences of the collision. But they agree with the learned Judge in his objection to the conjectural estimate of the measure of damages made by the Registrar and Merchants. They ought not to have formed any judgment as to the reduced damages, except upon the evidence of witnesses. By which of the parties these witnesses should have been produced was made a question in the course of the argument. It seems clear, that the Respondents could not have been expected to be prepared with proof of this description upon the reference. They claimed the entire value of the vessel and cargo, minus the amount of the proceeds of what had been sold, and they could not know that the Registrar and Merchants would reject that claim before their Report was made. On the other hand, the Appellant contended that the Respondents were not entitled to damages beyond those which could be attributed solely to the

collision, and the proof of the amount of those limited damages would seem more properly to have been a part of their case. But no evidence at all having been given, their Lordships think that the Registrar should have reported to the Judge his opinion that the Appellant was responsible only for the damages directly occasioned by the collision, and not for any which happened after the refusal of the Captain of the Respondents' vessel to accept the assistance which was offered to him, and that as to the amount of those limited damages no evidence had been given. If the Judge had adopted the view of the Registrar, he would have confirmed the Report, but referred the matter back to the Registrar to ascertain the damages upon that footing, and then the *onus* of proving the amount to which the Respondents would be entitled upon this restricted view of their claim would have fallen upon them.

Their Lordships upon the whole of the case will humbly advise Her Majesty that the decree appealed from should be reversed, except so far as it condemned the Respondents in the costs incurred on the reference before the Registrar and Merchants; that the cause be retained, and that it be referred back to the Registrar, assisted by Merchants, to ascertain the amount of the damages to which the Respondents are entitled down to the time when the Captain of the "*Willem Eduard*" first refused the assistance which was offered to him, and that there should be no costs of the appeal on either side.

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ON APPEAL FROM THE SUPREME COURT  
OF NEW SOUTH WALES.

WILLIAM DEAN and ARCHIBALD }  
STEWART - - - - - } *Appellants,*

AND

JAMES BYRNES, ROBERT COOK, CLARK }  
IRVING, THOMAS WALKER, and } *Respondents.\**  
THOMAS BUCHANAN - - - - - }

29th June,  
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A verbal agreement was entered into between *D.*, a broker and commission agent at *Sydney*, and *S.*, who speculated in sugars, in consequence

IN this case the Bill was filed in the Supreme Court of *New South Wales* by the Appellants against the Respondents, *Byrnes, Cook, and Irving*, the Trustees of the insolvent estate of one *Edwin Mawney Sayers*, under a deed of assignment, dated the 16th of *April*, 1860. The other Respondents, *Walker* and

\* Present: Lord Kingsdown, the Master of the Rolls (Sir John Romilly), and Sir John Taylor Coleridge.

of which two sums were advanced by *D.* to *S.* at different periods, the first for £3,000, and the second for £7,999. 15s. 3d., *S.* undertaking to place in the hands of *D.*, for sale, certain sugars to be imported from *Mauritius* and *Batavia*, *D.* taking the profits of the commission arising from the sale, and repaying his advances, with interest, out of the proceeds of the sale. Of the moneys thus borrowed, the sum of £3,000, with other moneys, was remitted by *S.* to *H. & Co.*, his agents at *Batavia*, for the purchase of sugars. From the state of the market *H. & Co.* could not then purchase any sugars on *S.*'s account, who in the interim became Insolvent, and executed a deed assigning his property to Trustees for the benefit of his creditors. After *S.*'s insolvency *H. & Co.* purchased *Mauritius* sugars with the money sent by *S.*, to whom the same was consigned and sold by the Trustees. The exact time when *H. & Co.* heard of *S.*'s insolvency did not appear, but they afterwards purchased *Batavian* sugars, and having heard of *S.*'s insolvency, consigned the sugars to *S.*, as agent of the Trustees. *S.* had deposited with *D.* promissory notes and acceptances of *J. and J. & Co.* by way of security for *D.*'s advances to him. *J. and C.* were interested in the adventure of *S.* After *S.*'s insolvency *J. & Co.* also became insolvent, and *D.* received from their estate the sum of £6,083. 12s., on account of their Bills, and applied

*Buchanan*, represented the insolvent estate of *Jones & Co.* under deeds of assignment. The suit was brought for the purpose of establishing upon certain sugars purchased by, or under the direction of, *Sayers*, a lien for the sum of £4,916. 14s. 1d., being the balance of moneys advanced to *Sayers* on the security of an equitable mortgage of, or charged upon, certain sugars, which, at the time of the advance of such moneys, *Sayers* intended to import into *Sydney*.

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The principal facts were these :—

The Appellant, *Dean*, was an Auctioneer and Commission agent at *Sydney*. The other Appellant, *Stewart*, became a partner with him pending the suit.

*Sayers* was largely engaged in the importation of sugars to the Colony. He was obliged to raise money by way of loan for the purposes of his adventures, and *David Jones* and *Jones & Co.*, who were interested in the adventures, agreed to give him their acceptances to be deposited by way of collateral security for the amount of the loan.

On the 13th of *December*, 1859, the Appellant *Dean*, at the request of *Sayers*, advanced to him £3,000, on the terms, as the Appellants alleged, that certain sugars to be imported from the Island

£3,000 to the payment of the first advance, and the balance towards the other sum of £7,999. 15s. 3d. *D.* claimed a lien on the sugars in respect of the sum of £4,916. 11s. 1d., the remaining part of the sum of £7,999. 15s. 3d. Held, affirming the decree of the Court below :—

First, that it was no part of the agreement that *S.* should invest the moneys lent him by *D.* in any particular way, and having assigned his property to Trustees for the benefit of his creditors before the purchase by *H. & Co.*, the sugars consigned were for the benefit of the Trustees, and that *D.* had no lien on the sugars.

Second, that *S.'s* Trustees allowing *H. & Co.* to purchase *Batavian* sugars on their account did not affect the Trustees with any equity in favour of *D.* under his agreement with *S.*

A Bill was filed by *D.* praying a declaration that he had a lien on the sugars consigned from *Batavia*, but the Bill did not mention the *Mauritius* sugars. Held, that as *D.* had so framed his Bill, he was precluded from afterwards insisting on any new claim by way of lien on the *Mauritius* sugars.



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of *Mauritius* and from *Batavia*, should be placed in the hands of *Dean* for sale, and that he should reimburse himself the amount of his advance out of the proceeds of sale.

This sum of £3,000, together with other moneys of his own, amounting altogether to £5,000, was despatched by *Sayers* on the same day, the 13th of *December*, 1859, to Messrs. *Hunter & Co.* his agents at *Mauritius*, with instructions to purchase sugars therewith.

On the 23rd of *December*, 1859, *Sayers* despatched a further sum of nearly £6,000, by a vessel called the "*Monarch*," to his agents at *Batavia*, to be laid out in the purchase of sugars there. This sum consisted, as to £5,000, part thereof, of *Sayers'* own money, not borrowed from *Dean*, and as to the residue thereof, of the proceeds to arise from certain merchandise shipped by *Sayers*, out of his own resources, for *Batavia*, for sale there on his own account.

On the 10th of *January*, 1860, eighteen days after *Sayers* had despatched the last-mentioned sum of money, he applied to *Dean* for further advances. Between the 10th of *January* and the 6th of *February*, 1860, *Dean* advanced to *Sayers* further sums, amounting to £7,999. 15s. 3d., on the terms, as *Dean* alleged, that the sugars to arrive from *Batavia*, should be placed in the hands of *Dean* for sale, in order that he might reimburse himself out of the proceeds the amount of his advance. No written memorandum of the terms of the advances was signed at the time when the advances were made. Shortly after these advances by *Dean*, *Sayer* deposited with him certain promissory notes and acceptances of *David Jones* and *Jones & Co.*, by way of security for the amount of his advances.

*David Jones* and *Jones & Co.* were jointly interested with *Sayers* in the transaction in question, and were entitled to one-third of the profits to arise from the adventure.

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*Sayers* finding himself in difficulties, *Dean* drew up, and procured his signature to the following memorandum, which was stated to embody the terms agreed on between *Sayers* and *Dean* and *Co.*, with reference to the advances:—"Dear Sirs, I hereby acknowledge to have received from you the under-mentioned sums, amounting to £10,999.15s.3d., as advanced on sugar to come to this port from *Mauritius* and *Batavia*, the following Bills being deposited in your hands as collateral security for the payment of the said advances from the proceeds of the sugars by ship or ships from *Mauritius*, and the '*Monarch*' from *Batavia* (the Bills amounting to £10,823. 5s. 5d.)." This memorandum was not dated, but concluded with an advance made on the 6th of *February*, 1860.

In *March*, 1860, *Sayers* suspended payment. The firm of *Jones & Co.*, on whom the Bills were drawn, also suspended payment about the same time, and their respective estates were assigned to Trustees for the benefit of the creditors as above mentioned. The Appellants ultimately received payment from the estate of *Jones & Co.* the sum of £6,083. 1s. 2d., and they applied part thereof, namely, £3,000, in payment of the £3,000 advanced by *Dean* to *Sayers* on the 13th of *December*, 1859, and the balance towards the payment of the advance of £7,999. 15s. 3d.

The money sent out by *Sayers* on 13th of *December*, 1859, for the purchase of sugars at the *Mauritius* was laid out by his agents in the purchase of sugar there. That sugar arrived at *Sydney*, and was taken posses-

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sion of by the Respondents, *Byrnes* and others, *Sayers'* Trustees, and was sold for their account by the Appellants, who accounted for the proceeds to *Sayers'* Trustees.

The money and proceeds of merchandise sent out by *Sayers* on the 23rd of *December*, 1859, for the purchase of sugars at *Batavia*, had not been laid out at the time when notice of the assignment of *Sayers'* estate reached Messrs. *Hunter & Co.*, his agents at *Batavia*.

Messrs. *Hunter & Co.* did not lay out any part of the money in purchasing sugar at *Batavia*, according to *Sayers'* instructions, but they subsequently, and after they had received notice of his assignment, as appeared by a letter of the 6th of *August*, 1860, proceeded to lay out the moneys sent out by *Sayers* on the 23rd of *December*, 1859, and which amounted to £5,900, or thereabouts, in the purchase of sugar at *Java* for the account of the Respondents, the Trustees of *Sayers'* estate, and they shipped the sugars bought by them to *Sydney* by two vessels, the "*Monarch*" and the "*Visser*." Both vessels arrived in due course at *Sydney* with their respective cargoes.

The sugar per "*Visser*" was, on its arrival in the Colony, sold by the Appellants, at the request and for the account of *Sayers'* Trustees, and the net proceeds of sale were paid over to the Respondents.

The Appellants, however, claimed a lien on the sugars per "*Monarch*," for the balance due to them in respect of the advance of the 23rd of *December*, 1859, of £7,999. 15s. 3d. The sugar was then sold by arrangement, and the proceeds retained or secured to abide the decision of the Court in this suit.

On the 7th of *March*, 1861, the Appellants filed their original Bill in the Supreme Court of *New South Wales*, against *Byrnes*, *Cook*, *Irving*, *Walker*,

*Foss, Cook, Buchanan, Sayers, David Jones, Thompson, and Symonds*, as Defendants thereto.

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By the original Bill, which was afterwards amended, the Appellants did not claim any lien on the sugar from the *Mauritius* for any part of the balance due to them. In their amended Bill they admitted, that the two loans of £3,000 and £7,999. 15s. 3d. were distinct and separate transactions, and that the £3,000 advanced had been paid and satisfied, and that the advance of £7,999 15s. 3d., in respect of the balance of which only a lien was claimed, was made against sugar to arrive from *Batavia* only.

The Defendants put in answers in the suit. They severed in their defence. *Cook* and *Irving* by their answer insisted, that the cargo of the "*Monarch*" was placed in *Sayers'* hands for sale without prejudice to any question between the parties, but that the cargo by the "*Visser*" was unfettered by such condition, and *Cook's* answer alleged, that at that time *Dean* set up no claim to any part of the cargo by the "*Visser*." *Jones* and *Symonds* disclaimed all interest in the proceeds of the sugars; and the Bill was dismissed as against them, but a claim was made on behalf of the Trustees of the estate of *David Jones* and *Jones & Co.* to an interest in the sugars, they alleging that four Bills which in the memorandum signed by *Sayers* were mentioned as given by *David Jones*, were given by him for the purpose of purchasing the sugars, and that the amount of the Bills was paid by the Trustees to the Appellants, in consideration of their giving up to the Trustees all claim upon the sugars purchased with the proceeds of the Bills to the extent of the interest of *David Jones* in the sugars.

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The cause came on for hearing before the Primary Judge, (Mr. Justice *Milford*,) who by his decree, dated the 13th of *May*, 1862, dismissed the Bill with costs.

The Appellants appealed. The appeal came on to be heard before the full Court, consisting of the Chief Justice, Sir *Alfred Stephen*, and Mr. Justices *Milford* and *Wise*, on the 3rd of *February*, 1863, when they affirmed the judgment of the Court below, and dismissed the appeal with costs.

The judgment of the Court was delivered by Mr. Justice *Milford*. After stating the facts of the case made by the Bill, he proceeded in these terms:—  
“The Primary Judge was of opinion, that although the original agreement, as alleged in the Bill, related to an advance to be made on the *Mauritius* and *Batavian* sugars, as forming an aggregate security, yet that the subsequent agreement, made when the £7,999. 15s. 3d. was advanced, constituted a new one by which the sugars from *Batavia* was alone agreed to be pledged for that sum, the *Mauritius* sugar remaining charged with the whole of the money advanced, and to be advanced. We are of opinion, that such is the statement in the Bill, and that the Plaintiff's claim must be limited accordingly. The letter signed by *Sayers*, stating what were the terms of the agreement, was in fact not written by him, and bears no date; but, according to *Sayers*' evidence, was signed in the early part of *April*, 1860, as an acknowledgment of what was the then existing agreement, and cannot be considered as itself constituting any agreement whatever. The Primary Judge appears to have thought that the Bill did not state a payment of the £3,000, at first advanced, and that, therefore, the Plaintiffs might apply what they had received by means of their collateral security in payment of what was due on the

*Batavian* sugars, so allowing the £3,000 to remain secured by the *Mauritius* sugars, if that could be made available. It became necessary, therefore, for him to consider whether there was a lien on the *Mauritius* sugars, and relying on the case of *Holroyd v. Marshall*, as it then appeared to have been decided, he was of opinion that there was no such lien. The subsequent decision of that case in the House of Lords, after two arguments, is reported 10 H. L. Cases 191, Lord *Wensleydale* there stating, *ib.* 213, that he had changed his opinion in consequence of the second argument. By this decision the judgment of the Lord Chancellor was overruled, and it establishes that, under the circumstances of the case, there would have been a lien if the £3,000 had remained an existing debt. We, however, on carefully considering the statements of the Bill, especially the 11th paragraph, think that the Plaintiff admits that the £3,000 originally advanced has been paid; and if so, all question as to the power of the Plaintiffs to appropriate any part of the money in their hands is at an end, and the circumstance that the Plaintiffs would have had a lien on the *Mauritius* sugars if the £3,000 had not been paid, is immaterial. We may, therefore, dismiss the original agreement and the *Mauritius* sugar from our minds, and confine ourselves to the consideration of the claim which the Plaintiffs say they have on the *Batavian* sugar for the residue of the £7,999. 15s. 3d. remaining unpaid, advanced, as the Bill alleges, on that alone. . . . The sugar sent by the "*Monarch*" and "*Visser*" from *Batavia* was, however, never the property of *Sayers*, therefore, the agreement which was to charge sugar the property of *Sayers* could not possibly affect that sugar, neither can it be successfully contended that the £5,979. 13s. 8d. was charged, or could be followed into the hands of

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the Trustees. The money advanced by *Dean* to *Sayers* was merely a loan, not an advance fixed with any trusts. *Sayers* was to be at liberty to lay out the whole, or any part he might think fit, in purchasing sugar at *Batavia*. There was no agreement that the sum of £7,999. 15s. 3d. should be sent to *Batavia*, and there laid out in sugar or other produce, which was to be sent to *Sayers* at *Sydney*. In fact the £5,979. 13s. 8d. had been sent in *December*, 1859, and the agreement as to the £7,999. 15s. 3d. did not take place till the 10th of *January*, 1860. On the whole, therefore, we do not see that the Plaintiffs have any lien on the sugar by the "*Monarch*" or "*Visser*," and it appears to us that the Plaintiffs themselves state in their Bill that the £3,000 originally advanced had been paid, so that whether the Plaintiffs had or had not a lien on the *Mauritius* sugar for that sum is immaterial. We must, therefore, dismiss the Plaintiffs' appeal with costs.

The appeal was from this decree.

Sir *Hugh Cairns*, Q.C., and Mr. *Dickinson*, for the Appellants.

The whole question depends on the true construction of an equitable agreement affecting a lien on certain sugar consignments. It is quite clear that by the agreement between *Sayers* and the Appellant, *Dean*, as stated in the amended Bill, all sums to be advanced by *Dean* to *Sayers* were to be charged and secured upon the sugars for which he was sending to *Mauritius* and *Batavia*. Such agreement and security intended to be thereby created applied to the whole advance of £10,999. 15s. 3d., and was not confined to the advance made in the first instance, of £3,000. The sugars, therefore, from the *Mauritius*, as well as those from

*Batavia*, were subject, as against *Sayers* to the Appellants' lien and claim thereon for the whole amount of £10,999. 15s. 3d., which was advanced to *Sayers* upon the faith of such agreement, and the proceeds of the sugars were subject to the same lien or claim as against the Respondents, the Trustees of the estate of *Sayers*, who took the same, expressly subject to all the lien and equities affecting them. *Holroyd v. Marshall* (a), where all the authorities on this point are collected, *Mogg v. Baker* (b), *Langton v. Horton* (c), *Whitworth v. Gaugain* (d), *Morse v. Faulkner* (e). As no part of the sugars, the subject of the suit, were purchased with the proceeds of any of the Bills of *Jones*, or of *Jones & Co.*, the Respondents, the Trustees of *Jones's* estate, have no title to any part of the proceeds of such sugars.

Mr. *Rolt*, Q.C. (Mr. *G. N. Colt*, with him) for the Respondents, *Walker* and *Buchanan*.

No contract, or agreement, was ever made between the Appellants and *Sayers*, sufficient to create a lien or charge in favour of the Appellants upon the sugars which were imported into *Sydney*, or any part of them. Even if any contract or agreement was made between the Appellants and *Sayers* sufficient to create any such lien, the rights of the Appellants were ceded in favour of the Trustees of *David Jones*. The contract or agreement which was actually made between the Appellant, *Deans*, and *Sayers*, as to sugars to be imported into *Sydney* by *Sayers*, was, however, subject to the prior

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(a) 10 H. L. Cases, 191.

(b) 3 Mee. & Wels. 195.

(c) 1 Hare, 549.

(d) 1 Phill. 728.

(e) 1 Anst. 11. S. C. 3 Swanst. 429.



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lien or charge of *David Jones* upon such sugars. But the Appellants have in their Bill alleged that the sum of £3,000 was only part of the advances made by them to *Sayers*, which was chargeable upon the sugars to be imported by him from the *Mauritius*, and that such sum has been repaid to them; and they cannot be entitled to any relief in the suit which is not founded upon or consistent with the truth of such allegations. The sugars which were imported into *Sydney* from *Batavia*, and which arrived by the ships "*Visser*" and the "*Monarch*," were not purchased out of funds supplied by the Appellants, and were purchased subsequently to the date of assignment made by *Sayers*, and no lien exists thereon.

The Attorney-General (Sir *R. Palmer*) (Mr. *Druce* with him), for the Respondents, *Cook* and *Irving*.

It is clear from the evidence, that the sugars from *Java*, the proceeds of which are, by the pleadings in the suit alone in question, were purchased with the moneys of the Respondents, *Sayers'* Trustees, and not with the Appellants' moneys, who have failed to establish any lien or charge of *Dean* by way of equitable assignment upon such sugars.

23rd July,  
 1864.

Judgment having been reserved, was now delivered by

Lord KINGSDOWN :

Two principal questions were argued in this appeal:—

First, whether, according to the pleadings, the Plaintiff, *Dean*, could establish any claim upon the sugars from the *Mauritius*, beyond that which had been

satisfied before the Bill was filed, viz., beyond the sum of £3,000.

Second, whether he had established any claims upon the sugars from *Java*.

The Judge before whom the case originally came was of opinion, that the evidence sufficiently made out that the agreement between the parties was, that the Plaintiff, *Dean's*, lien for the whole amount of his advances should extend both to the *Mauritius* and the *Java* sugars, but that by the Bill he had confined his claim to the sugars from *Java*, and that he could not, therefore, be permitted to make any demand on the sugars from *Mauritius*.

The Supreme Court, on appeal, was of opinion, that this claim must be so limited, and the propriety of this decision is the first point for our consideration.

We should very much regret being obliged to adopt a construction of the pleadings which would shut out the real justice of the case, and exclude the Plaintiff, *Dean*, from rights to which by his contract he was entitled ; and if the difficulty were created merely by paragraph five of the amended Bill, we might, perhaps, be able to get over it. But on looking at the whole record, at the statement in the original Bill, and the alterations introduced by the amendment, it appears to us, that the statement of the contract as it now stands was made deliberately and repeated after much consideration, and that the construction put upon it by the Court is in accordance with the actual conduct of the parties, and that the agreement supposed to be proved by the evidence is in contradiction to that conduct.

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The sugars from the *Mauritius* had all arrived at *Sydney* previously to the month of *September*, 1860, and the sums actually realized by sales previously to that time, and paid to the Trustees, amounted to about £14,000, a sum much more than sufficient to cover the whole demand of the Appellant, *Dean*, with interest; besides which there were sugars by the "*Yarra*" not sold till the month of *January*, 1861, to the amount of £3,000, and upwards.

According to the Appellants' present contention, *Dean* was entitled to a lien on these funds for the whole amount of his advances (£10,999. 15s. 3d.), made under one agreement and on one security.

But what took place in *September*, 1860, seems quite inconsistent with any such agreement. He then, by arrangement with *Jones* and the Trustees, received on *Jones's* Bills £6,083. 1s. 2d., and this sum he applied, as even by the amended Bill he alleges, in discharge "of the £3,000 and interest, and also in reduction of the £7,999. 15s. 3d."

Surely this is a strong confirmation of the fact that the advances were considered by the Plaintiff, *Dean*, as distinct advances on distinct securities. After the receipt of the amount of these Bills, there remained due to the Plaintiff, *Dean*, the sum of £4,916. 14s. 1d., with interest. In the month of *January*, 1861, the *Java* sugars by the "*Monarch*," and a portion of those by the "*Visser*," were sold.

The proceeds of the sugars by the "*Monarch*" amounted only to £4,883. 0s. 2d., and were, therefore, insufficient to satisfy the sum due to the Plaintiff, *Dean*. The proceeds of that portion of the sugars by the "*Visser*" which was sold in *January*, 1861,

amounted to £1,552. 18s. 2d., and the two sums together would have been sufficient to satisfy the Plaintiff's demand.

These sales were made, and the proceeds were received by the Plaintiff, *Dean*, as broker, on the 30th of *January*, 1861. He was called upon by the Trustees to pay over to them these sums.

The memorandum of the agreement signed by *Sayers* in *March*, or *April*, 1860, relied on by the Respondent, in speaking of sugars from *Batavia*, mentioned only sugars by the "*Monarch*." But the Plaintiff, *Dean*, contended, that he was entitled to a lien on the sugars by the "*Visser*," as well as on those by the "*Monarch*." This claim was disputed by the Trustees, and on the 7th of *March*, 1861, the Plaintiffs filed their original Bill stating two distinct agreements, one for the advance of £3,000, on the security of the *Mauritius* sugars, and one for the advance of £7,999. 15s. 3d. on the *Batavian* sugars.

The Bill stated, that the £3,000 advanced on the credit of the *Mauritius* sugars had been paid to the Plaintiff, *Dean*, out of the proceeds of those sugars. It then stated, that sugars from *Batavia* had arrived by the "*Visser*" and the "*Monarch*," and had been placed in his hands for sale without prejudice to the rights of the parties; that he had a lien on the proceeds of both the said cargoes of sugar for the amounts due to him, but that the Trustees threatened to sue him at law for the recovery of these proceeds; and it prayed a declaration that he had a lien on both the cargoes, and an injunction to restrain proceedings at law by the Trustees. It is clear, therefore, that at this time he did not set up any claim on the *Mauritius* sugars, though it was doubtful whether

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the *Batavian* sugars included in his security would be sufficient to satisfy the full amount of *Dean's* debt.

That this Bill related only to the *Batavian* sugars is beyond controversy. It is perfectly clear from the Bill, from the affidavits both of the Plaintiff and of *Sayers*, and from the proceedings on the motion for injunction. When an application was made for an injunction, it was ordered to stand over, with liberty to both parties to file fresh affidavits as to the proceeds of the cargo by the "*Monarch*," and, finally, by the Order made on the 23rd of *April*, 1861, the injunction was confined to the sugars by the "*Monarch*."

The Defendants put in their answer to this Bill. The Trustees of *Sayers* severed in their answer. *Cook* and *Irving* insisted, that though the cargo by the "*Monarch*" was placed in the hands of *Sayers* for sale, without prejudice to any question between the parties, the cargo by the "*Visser*" was not made subject to any such conditions; and *Cook* alleged that at that time the Plaintiffs set up no claim to any part of the cargo by the "*Visser*."

More than six months after the filing of the original Bill, the Plaintiffs amended it. At this time the matter had been the subject of discussion in Court, the Plaintiffs must have been fully alive to *Dean's* rights, and he now had the opportunity of correcting any mistake which had been made in the statement of his case in his original Bill.

The amendments were directed to three points. First, they struck out the statement contained in the original Bill, that there were two several agreements between him and *Sayers*, and alleged only one agreement, but they left the statement of the contract in

other respects as it stood in the original Bill. The effect being this, that *Sayers* being about to speculate in sugars to be imported from the *Mauritius* and *Batavia*, *Dean*, the Plaintiff, had engaged to make advances on the security of the sugars, and had first advanced £3,000, on the faith of that agreement, and afterwards advanced £7,999. 15s. 3d. on the security of the *Batavian* sugars.

The second amendment was directed to this point. The original Bill had stated that the £3,000 had been paid out of the proceeds of the *Mauritius* sugars. The amended Bill stated, as the fact was, that the payment had been made by means of *Jones's* Bills; thirdly, in support of the Plaintiffs' claims on the sugars by the "*Visser*," which was one of the main points in dispute, a charge was introduced that the sugars which arrived on board the "*Visser*" were in fact only the cargo of the "*Monarch*," and that the "*Visser*" and the "*Monarch*" respectively brought no cargoes except the cargo of the "*Monarch*."

The prayer of the Bill remained unchanged, and although by altering the antecedent words to which the prayer relates its meaning might have been altered, in fact no such alteration was made, and the amended, like the original Bill, sought relief only against the *Batavian* sugar.

That this is the true meaning of the prayer of the amended Bill is stated distinctly in the third paragraph of the Plaintiffs' petition of appeal against the decree of the Primary Judge:—"The cargoes of sugar mentioned in the prayer of the said Bill are certain sugars which arrived in *Sydney* from *Batavia* at the time and under the circumstances in the said Bill stated."

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Now, this is not a case in which the Plaintiff, *Dean*, can have been mistaken as to the rights for which he had contracted. It is not the case of a written instrument which he may have misconstrued. The agreement was verbal between himself and *Sayers*, and if he supposed that he had any right against the *Mauritius* sugars, it is inconceivable that instead of asserting it he should have persisted for months, and as far as appears up to the hearing, in urging doubtful claims against the *Batavian* sugars; admitting, if not in terms stating, that all his claims on the *Mauritius* sugars had been satisfied. That this was the actual agreement is rendered at least not improbable by the fact that the £3,000 were, on the same day on which the money was advanced, remitted to the *Mauritius* to purchase sugar, but no part of the other sum was so employed.

The document so much relied on by the Plaintiff, as containing the terms of the original agreement, is really of no value. It seems that a memorandum of those terms, whatever they really were, was made at the time. That memorandum was in the Plaintiff's possession. It is not produced, and he says that he has lost it. The memorandum contained in the letter signed by *Sayers* was not written by him; it was signed after he had become Insolvent: it clearly does not contain the original agreement as now represented by the Plaintiff, *Dean*, and nothing more, for it refers to Bills of exchange to the amount of £10,823. 5s. 5d. deposited as a collateral security with the Plaintiff, *Dean*, which formed no part of the original agreement between the Plaintiff, *Dean*, and *Sayers*, and it refers to sugars exported from *Batavia* by the "*Monarch*," and not by any other ship.

It seems to us that to give effect to what is now contended to have been the real agreement between the parties would be to contradict not only the statement of the Plaintiff, *Dean*, in the record, but that which, up to the hearing, he has always shown by his acts, as well as his allegations, that he considered to be the real agreement with *Sayers*. It would be to bind the Defendants by the terms of a parol agreement which has never been alleged, and which they have never had an opportunity of disproving.

Upon this point, therefore, we think that the Courts below were right.

There remains the question whether upon the facts appearing in evidence, the Plaintiff, *Dean*, has established a right to a lien on the sugars from *Batavia*, or any part of them.

The facts, as far as we can collect them from the evidence, appear to be these :—

It was no part of the contract between the Plaintiff, *Dean*, and *Sayers* that the moneys advanced by him should be invested in the purchase of any particular sugars, or of any sugars at all. It was a personal loan by a Broker to a Merchant, who represented that he was speculating in the purchase of sugar, and the loan was procured by the engagement that the Merchant would place in the hands of the Broker for sale the sugars which he was expecting from two quarters, the *Mauritius* and *Batavia*, and that the Broker should derive the profits of commission arising from the sale, and should repay his advances with interest out of the proceeds. The Plaintiff, *Dean*, could not insist upon the investment of the moneys which he advanced in any particular mode, nor insist upon the purchase by *Sayers* of any sugars in the *Mauritius*,

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*Batavia*, or elsewhere. If *Sayers* purchased no sugar, the Plaintiff, *Dean*, had no remedy except by an action to recover his debt. In fact, no part whatever of his advances was invested in the purchase of the *Batavian* sugar. The £3,000 which he first advanced were remitted, as we have observed, to *Mauritius*, and the remaining moneys were not advanced by him till the months of *January* and *February*, 1860.

But the funds with which the *Batavian* sugars were purchased, as well those by the "*Visser*" as those by the "*Monarch*," had been remitted by *Sayers* to Messrs. *Hunter & Co.*, his agents in *Batavia*, between the 17th and 20th of *December*, 1859, and orders had been given by him to his agents, at that time, to invest them in the purchase of sugars. Those orders, with the funds themselves, were sent by the "*Monarch*," in which ship it was intended that the sugars to be purchased should be sent home.

The funds and the orders were received by *Hunter & Co.*, in *Batavia*, and the receipt was acknowledged by them in a letter, dated the 12th of *February*, 1860. In this letter they stated the impossibility of executing the order for the purchase of sugars, and suggested various other modes of employing the funds.

On the 15th of *February* they wrote again to say that they were unable to procure any sugar, adding, "We fear, therefore, there is no other remedy but to find the ship employment till the sugar season comes round."

On the 23rd of *April*, 1860, they wrote again to say they were unable to procure any of the sugar

required, though they were sending samples round amongst the planters, and hoped to succeed before the grinding began at the works.

At this time they had in their hands the moneys which had been remitted to them by *Sayers*. But these moneys had before this time ceased to be his property, and had passed to his Trustees under the deed of the preceding 16th of *April*.

On the 3rd of *May*, having met unexpectedly with an opportunity of purchasing a lot of sugar, *Hunter & Co.* bought it for *Sayers*, and consigned it to him by the ship "*Visser*," and advised him of what they had done by a letter of that date.

The "*Visser*" seems to have arrived at *Sydney* in *June* or *July*, 1860, and the cargo was claimed on behalf of *Sayers'* Trustees on the one hand, and by the Plaintiff, *Dean*, on the other; and on the 20th of *August*, 1860, this cargo, as well as that by the "*Yarra*," was placed in the hands of *Sayers* for sale, and he signed a letter of that date, by which he agreed to dispose of the same by auction, and to pay over to the Trustees the proceeds thereof, and act generally under their directions in the matter.

We cannot make out from the evidence what was the sum produced by the first sale of the sugars by the "*Visser*." The portion sold in *January*, 1861, with respect to which an injunction was prayed, seems to have amounted, as we have stated, to £1,552.

We will assume that on the arrival of these sugars in *Sydney* nothing was done to affect the right of the Plaintiff, *Dean*, and that his claim stands upon the same ground as his right against the cargo of the "*Monarch*."

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With respect to this last cargo, it appears that it was purchased under these circumstances.

The "*Monarch*" had been detained and employed by *Hunter & Co.* on behalf of *Sayers* in various voyages on account of *Sayers* from the month of *February*, 1860, when she arrived, till the month of *November*, 1860.

The exact time when *Hunter & Co.* heard of the insolvency of *Sayers*, and of his assignment to Trustees for the benefit of his creditors, does not appear. We collect that they had not done so on the 23rd of *June*, for on that day they wrote to *Sayers* to say that they should wait for the *April* mail, which had not then arrived (which would, no doubt, convey the intelligence), and if they received by it no counter orders, they should have the "*Monarch*" put in order and set about purchasing her cargo of sugar.

On the 6th of *August* they wrote to Captain *Bremner*, who seems to have been authorized to act on behalf of the Trustees, and who had called at *Batavia* on his road to the *Mauritius*, in these terms:—" *Batavia*, *August* 6, 1860. Dear Sir,— Previous to your arrival from *Australia* we had waited two mails, expecting to hear from the Trustees of the estate of Mr. *Sayers*, relative to the disposal of the funds in our hands. Not having heard, we determined on fulfilling his (Mr. *Sayers*') original instructions, and load the "*Monarch*" back to *Sydney*, and we accordingly contracted for the sugars only a few days before your arrival. We have perused Mr. *Sayers*' letter, and also the one to ourselves, likewise Messrs. *Irving* and *Cook*'s letter authorizing you to act in the matter, and we are glad to see that we have adopted the course that they wished. We shall en-

deavour to close Mr. *Sayers'* account to a point, and shall make up his account current with interest, calculated to the time at which we render it."

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Under these circumstances, thus collected from the correspondence, the sugars by the "*Monarch*" were purchased. They were dispatched on the 8th of *November*, 1860, consigned to *Sayers*, and arrived in *Sydney*, and were sold in *January*, 1861.

It may be admitted, that, if *Sayers* had remained solvent, the Plaintiff, *Dean*, would have had the right which he now claims. But upon what ground? Not because the sugars had been purchased with his money; not because he had a lien on the moneys with which they had been purchased; not that he had any contract with *Sayers* that the sugars should be purchased; but upon this ground, that *Sayers* had agreed that any sugars which he should purchase in *Batavia* should be subject to the Plaintiff, *Dean's*, claim; and these sugars having been purchased by him in *Batavia*, and consigned to *Sydney*, they would have been, as his property, bound by his agreement.

But the sugars actually purchased were not purchased by him, or with his money, or on his account. They were purchased by the agents in *Batavia* on account of the Trustees, with their money, and consigned to *Sayers* only as their agent.

It was argued that the Trustees must be considered to have adopted the contract of *Sayers*, and to have purchased the sugars subject to the equities of the Plaintiff, *Dean*, under such contract. There would be great difficulty in holding that they had adopted the contract of *Sayers* by not interfering with the instructions given by him to his agents as to the investment of their funds in sugar. But the strong

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objection to this argument is, that there was no contract between the Plaintiff, *Dean*, and *Sayers* as to the purchase of the sugars. *Sayers* was at liberty, as far as any engagement with the Plaintiff was concerned, to buy sugars or not. The Trustees thought that the investment in sugar was a good employment of their moneys, and they, therefore, sanctioned it, but they did not thereby sanction a charge upon their property which might have attached upon the goods if they had remained the property of *Sayers*.

The reasoning upon which the Supreme Court has proceeded appears to us to be satisfactory, and we must humbly advise Her Majesty to affirm the decree appealed from, with costs.

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IN the matter of the Petition of Complaint of the  
Right Rev. JOHN WILLIAM COLENSO, D.D.,  
Lord Bishop of NATAL.\*

THIS was a petition presented to Her Majesty in Council by the Bishop of *Natal*, complaining of the illegality of the proceedings taken against him, and alleging the nullity of the sentence pronounced therein by the Lord Bishop of *Cape Town* as Metropolitan of

14th, 15th,  
16th, & 18th  
Dec. 1864.

The Queen,  
in exercise of  
Her authority  
as Sovereign  
and head of the  
Established  
Church, crea-  
ted by Letters  
Patent a  
Metropolitan  
and two suffra-  
gan Bishops,

\* Present:—The Lord Chancellor (Lord Westbury), Lord Cranworth, Lord Kingsdown, the Master of the Rolls (Sir John Romilly), and the Right Hon. Dr. Lushington.

with Episcopal jurisdiction and authority in the Colony of the *Cape of Good Hope*, which Colony had at the time a Legislative Council and House of Assembly. By the Letters Patent the Suffragan Bishops were declared subject and subordinate to the Metropolitan, in the same manner as a Bishop of any See within the Province of *Canterbury* was under the authority of the Archbishop thereof; the Colonial Metropolitan Bishop being subject to the general superintendence and revision of the Archbishop, with an ultimate appeal from any sentence pronounced by such Metropolitan to the Archbishop, or his successors, who should finally decide and determine the same. These Letters Patent were not made in pursuance of any Order in Council, or of a Statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the *Cape of Good Hope*, or of the Legislative Council of *Natal*.

Under these Letters Patent the Suffragan Bishop of *Natal* was consecrated and took the oath of canonical obedience to his Metropolitan. In the year 1863, certain charges of heresy and false doctrine having been preferred against the Bishop of *Natal*, before his Metropolitan, that Bishop sentenced the Bishop of *Natal* to be deposed from his office, and to be prohibited from the exercise of any divine office within any part of the Metropolitan Province of the Colony. Upon appeal to Her Majesty in Council, held:—

First, that as there was an independent Legislative Assembly in the Colony, there was no power in the Crown, by virtue of its prerogative (without the provisions of a Statute of the Imperial Parliament) to

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the *Cape of Good Hope*, for erroneous doctrines and teaching, and sentencing him to be deposed from his office of Bishop.

The petition was specially referred by Her Majesty to the Judicial Committee.

The petition and case, so far as it is necessary to state them for the purpose of showing the jurisdiction of the Metropolitan, upon the legality of which the proceedings wholly depended, and which

establish a Metropolitan See or Province, or to create an Ecclesiastical Corporation whose *status*, rights, and authority, the Colony could be required to recognise.

Secondly, that, even if the Letters Patent did create between the Metropolitan and suffragan Bishop an ecclesiastical *status*, yet the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over a suffragan Bishop, or over any other person.

Thirdly, that the oath of canonical obedience taken by the suffragan Bishop to his Metropolitan, did not confer any jurisdiction on the Metropolitan Bishop, by which a sentence of deprivation could be supported, nor was it legally competent to the parties to give or receive such a voluntary or consensual jurisdiction; and,

Lastly, that the proposed ultimate appellate jurisdiction given to the Archbishop of *Canterbury* was equally invalid.

It is the undoubted prerogative of the Crown to receive appeals in all Colonial causes, and by the 25th Hen. VIII. c. 19 (by which the mode of appeal to the Crown in Ecclesiastical causes is directed), it is by the 4th section enacted, that "for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery," an enactment which gave rise to the Commission of Delegates, which was abolished by the 2nd & 3rd Will. IV. c. 92, and for which the Judicial Committee of the Privy Council is by the 3rd & 4th Will. IV. c. 41, now substituted.

In a dispute in one of Her Majesty's Colonies, between two independent Prelates, which previous to the 25th Hen. VIII. c. 29, would have been referred to the Pope, Her Majesty has appellate jurisdiction, and can exercise the same by referring the matter under the 3rd & 4th Will. IV. c. 41, for the advice of the Judicial Committee of the Privy Council.

*Semble*.—Though the Crown may by its prerogative establish Courts to proceed according to Common Law, yet it cannot create any new Court to administer any other law.

As no Ecclesiastical Tribunal or jurisdiction is required in a Colony or Settlement, where there is no Established Church, the Ecclesiastical Law of England cannot be treated as part of the law which settlers carry with them from the mother country.

formed the single point decided by the Judicial Committee, disclosed the following facts and circumstances.

By Letters Patent under the Great Seal of the United Kingdom, dated the 31st of *May*, 1844, the District of *Natal* was annexed to the Settlement of the *Cape of Good Hope*, and the Legislature of that Settlement was empowered to make laws for its government, and by further Letters Patent of the 30th of *April*, 1845, the District of *Natal* was erected for certain purposes into a distinct and separate Government, and administered by a Lieutenant-Governor.

By Letters Patent of the 2nd of *March*, 1847, so much of the Letters Patent of the 31st of *May*, 1844, and the 30th of *April*, 1845, as authorized the Legislature of the *Cape of Good Hope* to make laws for the District of *Natal*, was revoked; and it was ordained and declared that a Legislative Council, therein particularly described, should make such Laws and Ordinances as might be required for that District.

By Letters Patent, dated *September* 25th, 1847, the Colony or Settlement of the *Cape of Good Hope* with its dependencies, and the Island of *St. Helena*, was erected and constituted to be a Bishop's See and Diocese, to be called the Bishopric of *Cape Town*; and by the same Letters Patent it was signified to the then Lord Archbishop of *Canterbury*, that Her Majesty had appointed *Robert Gray*, D.D., to be the Bishop of the Diocese, and the Archbishop was commanded to consecrate him as such Bishop, which he accordingly did. These Letters Patent reserved to Dr. *Gray* a right of resignation of the office and dignity of Bishop of *Cape Town*, and Dr. *Gray* did

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some time before the 23rd of *November*, 1853, duly resign the same.

By Letters Patent, bearing date the 23rd of *May*, 1850, the Legislature of the *Cape of Good Hope* was empowered to pass Ordinances establishing a representative Government for the Colony of the *Cape of Good Hope*, and Ordinances were accordingly passed by the Legislature and confirmed by Her Majesty; and a Parliament was thereby constituted and established, consisting of the Lieutenant-Governor, a Legislative Council and House of Assembly.

On the 23rd of *November*, 1853, Letters Patent were passed under the Great Seal for the purpose of erecting the District of *Natal* into a separate and distinct See and Diocese. The Letters Patent recited, that the See or Diocese of *Cape Town* had become, and then was vacant; Dr. *Gray* having by an instrument under his hand and seal resigned the same; that the See or Diocese was of inconvenient size; and that for the spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of *England* and *Ireland*, it was expedient and desirable that the same should be divided into three Bishoprics or Sees, to be styled the Bishoprics of *Cape Town*, *Graham's Town*, and *Natal*, the Bishops of the Sees of *Graham's Town* and *Natal*, and their successors, to be subject and subordinate to the See of *Cape Town* and the Bishop thereof, and his successors, in the same manner as any Bishop of any See within the Province of *Canterbury* was under the authority of the Archbishop of that Province, and the Archbishop of the same.

In consideration of these premises Her Majesty, by the same Letters Patent, erected the District of *Natal* into a separate See and Diocese, named and appointed the Appellant to be ordained and consecrated Bishop of such See, and signified the same to the Lord Archbishop of *Canterbury*, and commanded him to ordain and consecrate the Appellant to be Bishop of the See or Diocese of *Natal* in manner accustomed: and the Appellant was accordingly ordained and consecrated on the 30th of *November*, 1853, and soon afterwards proceeded to *Natal* and entered into and occupied the See of *Natal* as Bishop thereof, having first taken an oath of due obedience to Dr. *Gray*, who, by Letters Patent, dated at *Westminster*, on the 8th of *December*, 1853, had been appointed Metropolitan Bishop of *Cape Town*, such oath being administered by the then Archbishop of *Canterbury*, and being in the same words, *mutatis mutandis*, with the oath of due obedience to the Archbishop, taken by the Bishops of the Sees within the Province of *Canterbury*.

On the 1st of July, 1863, the Appellant while in *England* was served with a citation, signed by the Registrar of the Diocese of *Cape Town*, to appear before the Bishop of *Cape Town*, at the time and place therein mentioned, to answer certain charges of false, strange, and erroneous doctrine and teaching preferred against him by the Dean of *Cape Town*, the Archdeacon of *Graham's Town*, and the Archdeacon of *George*.

Annexed to this citation were Articles of charge founded on passages contained in two Books published by the Appellant, and entitled respectively, "St.

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*Paul's* Epistle to the Romans, Newly Translated and Explained from a Missionary Point of View ;" and "The *Pentateuch* and the Book of *Joshua*, Critically Examined." These passages, together with extracts from the Thirty-nine Articles of Religion, and other Formularies of the Church of *England*, which they were alleged to contradict, were specified and set forth at length in such Articles of charge which were served on the Appellant at the same time with the citation.

On the 5th of *October*, 1863, the Appellant, being still in *England*, wrote to the Bishop of *Cape Town* a letter, wherein he acknowledged the receipt of the citation, but added : "I am advised that your Lordship has no jurisdiction over me, and no legal right to take cognizance of the charge in question : I, therefore, protest against the proceedings instituted before you, and I request you to take notice that I do not admit their legality, and that I shall take such means to contest the lawfulness of your proceedings, and, if necessary, to resist the execution of any judgment adverse to me which you may deliver, as I shall be advised to be proper." In a subsequent part of the same letter he admitted that he published the matter quoted in the Articles annexed to the citation, but he claimed that the passages extracted be read in connection with the rest of the works from which they were taken ; and he denied that the publication of those passages, or any of them, constituted any offence against the laws of the United Church of *England* and *Ireland*. He further added, "I have instructed Dr. *Bleek*, of *Cape Town*, to appear before your Lordship on my behalf for the following purposes :— First, to protest against your Lordship's jurisdiction.

Second, to read this letter (of which I have sent him a duplicate) as my defence, if your Lordship should assume to exercise jurisdiction. Third, if you should assume jurisdiction, and deliver a judgment adverse to me, to give you notice of my intention to appeal from such judgment."

On the 17th of *November*, 1863, the Bishop of *Cape Town*, together with the Bishop of *Graham's Town* and the Bishop of the *Orange Free State*, assembled in the Cathedral Church of *Cape Town*, and proceeded to hear the charges mentioned in the citation. Dr. *Bleek* attended on behalf of the Appellant, and protested as well against the assumption of jurisdiction by the Bishop of *Cape Town* and the other Bishops, as against the validity and legality of the whole proceedings. Notwithstanding such protest, the Bishop of *Cape Town* assumed to exercise jurisdiction, and heard the charges; and without, as the Appellant insisted, any sufficient evidence or proof, or any admission, except the before-mentioned letter, concluded the cause; and subsequently, on the 16th of *December*, in the same year, pronounced the following sentence and decree:—"In the name of God, Amen:—We, *Robert*, by Divine permission Bishop of *Cape Town* and Metropolitan, do hereby make known that,—Whereas the Bishop of the See of *Natal* is declared in the Letters Patent issued to us, under Her Majesty's Sign Manual, on the 8th day of *December*, 1853, to be subject and subordinate to the See of *Cape Town* and the Bishopric thereof, in the same manner as any Bishop and See in the Province of *Canterbury* is under the authority of the Archiepiscopal See of that Province and the Archbishop of the same: and whereas,

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further, it is provided in the said Letters Patent, that in case any proceedings should be instituted against the said Bishop of *Natal*, such proceedings should originate and be carried out before us : and whereas we are, by the same Letters Patent, directed and authorized to take cognizance of such proceedings: and whereas at the time of the appointment and consecration of the Right Rev. *John William Colenso*, the Bishop of *Natal*, the said Bishop of *Natal* did voluntarily recognize and submit himself to the provisions of the said Letters Patent, and did accept the said office of Bishop of *Natal* under the said provisions, and did then solemnly profess and promise all due reverence and obedience to the Metropolitan Bishop of *Cape Town*, and to his successors, and did thereafter, in due accordance with such promise and profession, continue to submit himself to our jurisdiction as such Metropolitan, and from the said promise and profession has never been relieved : and whereas on the 12th day of *May* last the Very Rev. the Dean of *Cape Town*, the Venerable the Archdeacon of *Graham's Town*, and the Venerable the Archdeacon of *George*, did lay before us, as such Metropolitan, in writing, certain charges against the Right Rev. *John William Colenso* : — firstly, of having promulgated opinions which contravene and subvert the Catholic Faith as defined and expressed in the Thirty-nine Articles of Religion and the formularies of the Book of Common Prayer of the United Church of *England* and *Ireland* ; and, secondly, of having depraved, impugned, and otherwise brought into disrepute the Book of Common Prayer, particularly portions of the Ordinal and Baptismal Services, and of having thus violated the Law of the United Church of *England*

and *Ireland*, as contained in the Thirty-sixth of the Canons and Constitutions Ecclesiastical; and the said Dean and Archdeacons did then declare themselves ready to prove the said charges, and to claim our judgment thereon: and whereas we did thereafter, on the 18th of *May* last, cause the said Bishop of *Natal* to be cited to appear before us on the 17th day of *November* following, in the Cathedral Church of *Cape Town*, to answer the said charges: and whereas on the said 17th day of *November* we did, as such Metropolitan as aforesaid, hold a Court in the said Cathedral Church, having previously invited certain of the Bishops of this Province to be present as Assessors, and the Bishop of *Graham's Town*, and of the *Orange Free State*, being then present with us as such Assessors: and whereas on the said 17th day of *November* the said Bishop of *Natal* appeared by his Agent, and did then, as well by his said Agent as also in a letter addressed to us, admit the service of the said citation upon him, and his knowledge of the charges he was called upon to answer; and did further, in answer to the said charges:—firstly, offer a protest against our jurisdiction; secondly, did submit certain matters of defence to the said charges; and, thirdly, did intimate to us his intention of appealing, if we should proceed to the delivery of a judgment, and such judgment should be adverse to him: and whereas we did then refuse to regard the said protest, and did proceed to the hearing of the charges brought as aforesaid: and whereas the aforesaid Dean and Archdeacons did there in open Court submit to our judgment certain extracts from two works, alleged to have been written and published by the said Bishop of *Natal*,—to wit, '*St. Paul's*

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Epistle to the Romans, Newly Translated and Explained from a Missionary Point of View,' and parts I. and II. of the '*Pentateuch* and Book of *Joshua*, Critically Examined,' copies of which extracts had been before served upon the said Bishop of *Natal* with the citation aforesaid, and of which extracts other copies are hereunto annexed and herewith recorded : and whereas, after hearing the said Dean and Archdeacons, and duly considering the matters of defence submitted as aforesaid, and after due consultation with the said Bishop of *Graham's Town* and the *Orange Free State*, present with us as Assessors, we have found it sufficiently proved that certain of the said extracts, to wit, those of them arranged under the heads of schedule I. to schedule VIII., do contain opinions as charged, which contravene and subvert the Catholic Faith as defined and expressed in the Thirty-nine Articles of Religion and the Formularies of the Book of Common Prayer of the United Church of *England* and *Ireland*, and certain other extracts, to wit, those arranged under schedule IX., do, in substance, deprave, impugn, and bring into disrepute the Book of Common Prayer : and whereas it was further duly proved that the works from which the said extracts have been taken were published both in this Province and elsewhere, with the knowledge and by the authority and consent of the said Bishop of *Natal*. Now, therefore, we, in exercise of our jurisdiction aforesaid, do hereby sentence, adjudge, and decree the said Bishop of *Natal* to be deposed from the said office as such Bishop, and to be further prohibited from the exercise of any divine office within any part of the Metropolitan Province of *Cape Town*. But inasmuch as the said Bishop of *Natal* is not

personally present, and we desire to afford him sufficient opportunity of retracting and recalling the extracts aforesaid before this sentence shall take effect, we do suspend the operation of the said sentence, for the purpose of such retraction, until the 16th day of *April* next; and we hereby decree and order that if, on or before the 4th day of *March* next, the said Bishop of *Natal* shall have filed of record with *Douglas Dubois*, of Doctors Commons, in the City of *London*, Proctor, Solicitor, and Notary Public, our Commissary in *England*, at his office, 7, *Godliman Street*, Doctors Commons, *London*, a full, unconditional, and absolute retraction in writing of all the extracts aforesaid; or otherwise shall have, before the 16th day of *April* next, filed with the Registrar of this Diocese at his office in *Cape Town*, such full, unconditional, and absolute retraction and recall of the said extracts, then in either case on the day of such filing, this sentence shall become null and void; but if, on the said 16th day of *April* next, no such retraction shall have been recorded in manner above set forth, then the said sentence shall be of full force and effect, and shall be published so soon as convenient after the said 16th day of *April*, in all the Churches of the Diocese of *Natal*, and in the several Cathedral Churches of the Province of *Cape Town*. In testimony whereof we have hereunto caused our Episcopal Seal to be affixed, and do subscribe our hand in open Court, this 16th day of *December*, A.D. 1863, in the Cathedral Church of *St. George*, and do deliver the same to the Registrar of this Diocese to be duly recorded. *R. Cape Town.*" (L.S.)

At the same time and place, immediately after the above sentence had been pronounced, Dr. *Bleek*, on

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behalf of the Bishop of *Natal*, gave notice of appeal in the words following :—"On behalf of the Right Rev. the Lord Bishop of *Natal*, I again protest against the legality of the present proceedings and the validity of this judgment: and with all respect to your Lordship personally, I, on the Bishop's behalf, give you formal notice that the said proceedings and judgment are and will be regarded and treated by him as a nullity void of all force and effect. And I, in like manner, further give notice, that the Bishop of *Natal* will, if the same shall be expedient or necessary, and if he shall be thereunto advised, appeal from or otherwise contest the lawfulness of these proceedings, and will, if need be, resist any attempt to enforce and carry out the execution of this judgment in such manner and by such lawful ways and process as he shall be advised to be proper."

To this protest and notice the Bishop of *Cape Town* replied to the effect, that he could not recognize any appeal except to the Archbishop of *Canterbury*, and that he must require that appeal to be made within fifteen days from that time.

No appeal to the Archbishop of *Canterbury* was asserted by the Petitioner, the Bishop of *Natal*, who, conceiving himself aggrieved by the proceedings and sentence of the Bishop of *Cape Town*, presented a special petition and complaint to Her Majesty in Council, setting forth the circumstances above stated, and praying to be heard against the validity and legality of the sentence, and for a reference to the Judicial Committee to hear and determine the same. To this petition Her Majesty was graciously pleased to assent, and to order that the same should be re-

ferred to the Judicial Committee of the Privy Council, to hear the same, and report their opinion thereupon.

The petition accordingly now came on for hearing, when their Lordships directed that, in the first instance the question of jurisdiction should be alone argued.

Mr. *W. M. James*, Q.C., Mr. *Fitzjames Stephen*, Mr. *Westlake*, and Mr. *E. Charles*, for the Petitioner.

This is a criminal proceeding, penal in the highest degree, being nothing less than a sentence of deprivation against a Bishop. The validity of that sentence depends on the effect of the Letters Patent of the 8th of *December*, 1853, appointing Dr. *Gray* the Bishop of *Cape Town* and constituting him Metropolitan of the Colony of the *Cape of Good Hope*. It must be observed that these Letters Patent are of a date subsequent to those by which the See of *Natal* was erected, and the present Bishop appointed: they were dated on the 23rd of *November*, 1853—the Bishop being consecrated on the 30th of the same month, and the oath of canonical obedience to a Metropolitan, not then in existence, administered to, and taken by, the Bishop of *Natal*, in perfect ignorance of his *status* at that time, or that there was either in fact or law any Metropolitan to whom obedience was due. That disposes of the paragraph in the sentence of the Bishop of *Cape Town* which erroneously states, that the Petitioner, at the time of his appointment and consecration, voluntarily recognized and submitted to the provisions of the Letters Patent appointing Dr. *Gray* Bishop of *Cape Town*, and accepted his office of Bishop of *Natal* under the provisions

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in the Letters Patent, and did then solemnly promise due reverence, and to submit to the Bishop of *Cape Town* as Metropolitan.

The important question is, the validity or invalidity of the Letters Patent of the 23rd of *November*, 1853. The Letters Patent purport to establish a Court of criminal jurisdiction in a Colony which already possessed a constitutional Government. This they could not do. *Bac. Abr.*, tit. "Prerogative" (B. 3.); *Com. Dig.* tit. "Prærogative" (D. 28.), where it is laid down that the King, by his prerogative, may make what Courts for the administration of the Common law he pleases; but he cannot erect a Court of Chancery, or conscience, for the Common law is the inheritance of the subject. Moreover, the Bishop of *Natal* was, by his Letters Patent, created for life, and his office could, therefore, only be determined by a writ of *Scire facias*, *Viner's Abr.*, tit. "*Scire facias*," or conviction for a criminal offence by a Court of competent jurisdiction. *Com. Dig.* tit. "Officer," K. 11. The *Eton College case* (a), *Long v. Bishop of Cape Town* (b), fully explains the position of the English Church in the Colonies. But the Crown is unable to create a Court with Ecclesiastical jurisdiction. By the 1st of *Eliz.* c. 1, secs. 17 & 18, power was given to the Crown to create the Court of High Commission; that Court was, however, abolished by the 16th of *Cha.* I. c. 11, sec. 3 & 4, and, though the ordinary jurisdiction of Ecclesiastical authorities was subsequently re-established by the 13th *Cha.* II. c. 12, sec. 2, yet that Statute, as well as the preceding one, expressly provides against any power remaining in the Crown to re-establish the High Commission Court, or any Court having

(a) 8 Ell. & Bla. 610. (b) 1 Moore's P. C. Cases, N.S. 411.

Ecclesiastical jurisdiction. It is matter of history that in all cases where Ecclesiastical jurisdiction has been created, or Bishops appointed, it has been by Statute, 31st *Hen. VIII.* c. 9. The *Eton College case* (a). In the case of *Bowerbank v. The Bishop of Jamaica*, the Bishop was appointed by Letters Patent, but the appointment was confirmed by a local Act of the Island (b). The Bishopricks in the *East Indies*; 53rd *Geo III.* c. 115, s. 49; 3rd & 4th *Will. IV.* c. 85, s. 93. So of *New Zealand*, 15th & 16th *Vict.* c. 88, and the new Bishopricks of *Manchester* and *Ripon* were also created by Statute, 6th & 7th *Will. IV.* c. 77; 10th & 11th *Vict.* c. 108. There is, however, a fatal objection to the Letters Patent of the Bishop of *Cape Town*, which profess to give a final appeal to the Archbishop of *Canterbury*, that is, a delegation of the authority of the Crown, the Supreme head of the Church, and the ultimate appeal in all Ecclesiastical causes, to the prejudice of the subject, which it is not competent for the Crown to make, and is in derogation of the right expressly given by the Letters Patent to the Bishop of *Natal*. The expression that he should be "subject and subordinate to the Bishop of *Cape Town* in the same manner as a suffragan Bishop of the Province of *Canterbury* was subject and subordinate to the Archbishop of *Canterbury*," clearly shows that he is to be under the Bishop of *Cape Town*, with the usual right of appeal to the Queen in Council. His right, we insist, must be determined by the Letters Patent appointing him Bishop of *Natal*, and not those subsequently constituting the Bishop of *Cape Town* the Metropolitan. Then as to the consensual juris-

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(a) 8 Ell. & Bla. 610. (b) 2 Moore's P. C. Cases, 449.

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diction, even if the relation between the Bishops of *Natal* and *Cape Town* could be viewed as one of contract, the Bishop of *Natal* knew nothing of the Letters Patent to Dr. *Gray*, and cannot be held to have subjected himself to any supposed jurisdiction thereby created. In the case of *Long v. Bishop of Cape Town*, Mr. *Long* had obtained his office from the Bishop himself, who had in this case nothing to do with the appointment of Dr. *Colenso*; but even then it was held that there was no consensual jurisdiction. No English Bishop can be tried for heresy or any other offence except by the Queen's Royal Commission. The Archbishop of *Canterbury* has no jurisdiction; but even if he ever had such it was wholly taken away by the Church Discipline Act, 3rd & 4th *Vict.* c. 86. The only case to be found where such authority has been assumed by the Archbishop is that of *Lucy v. The Bishop of St. David's* (a), but the question of jurisdiction was not there raised or argued. So in *The Bishop of Clogher's case* (b), the Archbishop of *Armagh* acted in his visitatorial capacity, and the jurisdiction not being disputed, judgment was by default. The power which was formerly exercised by the Pope is now vested in the Crown by the Statute, 24th *Hen. VIII.* c. 12. The Sovereign, as supreme Visitor, has authority in every Ecclesiastical matter, 26th *Hen. VIII.* c. 1; *Caudrey's Case* (c); *Com. Dig.* tit. "Visitor." All the authorities, from the earliest period of Church history, support these propositions. *Chron. of Battle Abbey*, p. 91; *Archbishop Cranmer, Ref. Leg. Eccl.* p. 200; the Cases of Bishops *Bonner* and *Gardiner*; *Fox's Martyrs*, Vol. II. p. 71; *Viner's Abr.*, tit. "Prerogative of the King," G. f. 2; 1 *Bing. Antiq.*

(a) 14 St. Tri. 447. 1 *Ld. Ray.* 539. (b) *Ann. Reg.* 1822.

(c) 3 *Co. Rep.* Pt. 5. p. xl.

p. 212; 2 *Spelman's Concilia*, 3; *Watson's Clergyman's Law*, c. 6, pp. 56 & 57 (Ed. 1747); *Case of Dr. Compton (a)*; *The Case of Proxies (b)*; *Regina v. The Archbishop of Canterbury (c)*. Then, if the Bishop of *Cape Town* had no such jurisdiction as he assumed to exercise, the proceedings are null and void, and must be quashed; or in the alternative, if he had such a jurisdiction, it must be subject to appeal to the Queen in Council. *Co.* 4th Inst. 339; *Hooker, Ecc. Pol.* Vol. II. pp. 256, 482 (2nd Ed.); 25th *Hen.* VIII. c. 19, s. 6; *Case of Archbishop Abbot*, 2 St. Tr. p. 1159. No doubt can be entertained as to the power of the Crown to review proceedings in the Colonies, or the right of the subject to appeal, *Christian v. Corren (d)*; *In re the Justices of the Supreme Court of Bombay (e)*; and since by the Statute, 3rd & 4th *Will.* IV. c. 41, by reference to this Tribunal. *In the matter of the Bailiff and Jurats Court of Guernsey (f)*; *Re Bedard (g)*; *In re the Island of Cape Breton (h)*.

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The Queen's Advocate (Sir *R. Phillimore*, Q.C.),  
Sir *Hugh Cairns*, Q.C., and Mr. *Badeley*, for  
the Bishop of *Cape Town*.

This case comprises three principal points:—

First, had the Bishop of *Cape Town* jurisdiction to try the Petitioner for heresy and deprive him? We submit that he had. Such jurisdiction may be either coercive or consensual. It is true that in *Long v. The Bishop of Cape Town (i)* it was decided, mainly

(a) 11 St. Tri. 1123. 545.

(b) *Davies*, Rep. 10.

(c) 1 El. & El. 545.

(d) 1 P. Wms. 329.

(e) 1 Knapp, P. C. Cases, 1.

(f) 5 Moore's P. C. Cases, 49.

(g) 7 Moore's P. C. Cases, 23.

(h) 5 Moore's P. C. Cases, 259.

(i) 1 Moore's P. C. Cases, N. S. 411.

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on the authority of *Campbell v. Hall* (a), that the Bishop of *Cape Town* had no positive or coercive jurisdiction; but with respect to coercive jurisdiction the present case differs, and is taken out of the authority of *Campbell v. Hall* by the important fact, that *Natal* is a conquered country, and, therefore, the Crown by its prerogative had the right to make laws for that Colony. It was not till the year 1856, that representative institutions were given to the District of *Natal*. The Letters Patent were granted in 1853. The Crown, therefore, had authority to make the provisions in the Letters Patent matters of positive and coercive enactment. Then as to consensual jurisdiction, it is clear that, as a matter of contract under the operation of his Letters Patent, the Bishop of *Natal* has subjected himself to the Bishop of *Cape Town*, in the same way that a suffragan Bishop of the Province of *Canterbury* is subject to his Metropolitan. The sole point is comprised in the question, Has the Archbishop of *Canterbury* power to deprive his suffragan for heresy? No authorities have been cited by the Petitioner which establish that he has not such power. The cases of Bishops, *Bonner* and *Gardiner* were tried under the Statute, 26th Hen. VIII. c. 1, which has since been repealed, and The *Case of Archbishop Abbot* (b) was tried by the High Commission Court. It is contended, on the other side, that the Crown might appoint a Commission to try a Bishop for heresy; but the power to issue such Commission is entirely destroyed by the Statutes abolishing the Court of High Commission. Now, it is clearly established by *Lucy v. Watson* (c), and the

(a) Cowp. 204.

(b) 2 St. Tr. 1150.

(c) 1 Ld. Raym. 539.

case of the *Bishop of Clogher* (a), that it is in the power of the Archbishop, as Metropolitan, to deprive a suffragan Bishop. And, on this point, may be cited *Lyndwood's Provinciale*, B. I. tit. 34; *Ayliffe's Par.* p. 92; 1 *Gibson's Cod.* 133: Book of Assignations, A.D. 1636-7, p. 137; *D'Oyley's Life of Archbishop Sancroft*, p. 115; *In the matter of the Dean of York* (b); and *Dr Warren's case*, in *Grind. Compend.* p. 408; *Poole v. The Bishop of London* (c).

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Secondly, then arises the question whether at this stage of the proceedings there is an appellate jurisdiction to the Crown. Supposing that it be granted that the Bishop of *Cape Town* had no jurisdiction whatever, coercive or consensual, that there was no Court, no trial, no sentence, that the whole proceeding was null and void. How then can there be an appeal? It may be said, that in the present instance, harm having been done, some remedy for the injury ought to be provided; but if such is the state of the case, *Dr. Colenso* had the power of instituting proceedings, similar to those instituted in *Long v. The Bishop of Cape Town* (d), and the *locus* for such proceedings would be the regular civil Court at *Natal*, or it might be at *Cape Town*; but there is no direct appeal, as attempted in this instance. Should the Bishop of *Natal* allege that he is injured by the Letters Patent of the Bishop of *Cape Town*, on the ground that they were inconsistent, and interfered with his rights under his own Letters Patent, his remedy is to take proceedings in this country by *Scire facias*. Assuming, however, that coercive jurisdiction was given by the

(a) Ann. Reg. 1822.

(b) 2 Q. B. Rep. 38.

(c) 14 Moore's P. C. Cases, 262.

(d) 1 Moore's P. C. Cases, N.S. 411.



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Letters Patent of the Bishop of *Cape Town*, the authority which established that jurisdiction could prescribe the channel in which an appeal should flow. It has in fact done so in the Letters Patent, and from them the course to be pursued must be collected. Now, the Letters Patent of the Petitioner point out a *Judex*, namely, the Bishop of *Cape Town*; a Court, the Metropolitan Court of *Cape Town*; and the proper mode of appeal therefrom to the Archbishop of *Canterbury*. It is, however, said, that this is inconsistent with the second Letters Patent to the Bishop of *Cape Town*, constituting him Metropolitan, as the appeal to the Archbishop of *Canterbury* is inconsistent with Metropolitan jurisdiction. There is, however, no such inconsistency; the object of the Letters Patent to Dr. *Colenso* was to point out the Judge and the Court by which he is to be immediately controlled. The second Letters Patent supplied what was avowedly left open in the first, and decided the course of appeal. We are willing to concede, that if an appeal in the present instance had been made to the Archbishop of *Canterbury*, the other side might rely upon the Statute, 25th *Hen. VIII.* c. 19, s. 4, in support of a further appeal to the Crown; but if those Courts and the chain of appeal has not been regularly constituted, if, as the Petitioner contends, the whole proceeding is nugatory and *ultra vires*, this is not the Tribunal to which one of Her Majesty's subjects can resort who feels himself aggrieved by an utterly unfounded assumption of judicial authority. There has been no ground for action, if the whole proceeding was a nullity; and if a civil injury has been done, the Civil Courts are open for redress. If one who is no Judge affects to try and sentence another in what is no Court, by what is no judicial process,

whatever may be the remedy, it is not to be sought for here.

Then as to the consensual jurisdiction. The parties to the contract are the Crown, the Bishop of *Cape Town*, and the Bishop of *Natal*. It is important to bear in mind the dates. Dr. *Colenso's* Patent is dated the 8th of *November*, 1853, and his oath of submission the 8th of *December* following. Dr. *Gray's* Patent is dated the 8th of *December*, 1853. Now, it is true that Dr. *Colenso's* Patent is earlier than that of his Metropolitan, but we submit that it is clear that this constituted part of one complete arrangement. The various Letters Patent, the resignation, re-appointment, and oath, &c., formed but one transaction in which the relative positions of the Sees of *Natal* and *Cape Town* were defined. Dr. *Colenso* in his own Letters Patent was referred to others which were about to be granted to the Bishop of *Cape Town*, and he must be taken as abiding by the arrangement which both were intended to carry into effect. That view disposes of the argument that at the time of his oath, the Bishop of *Natal* did not know the form of the Letters Patent constituting the See of *Cape Town*. The whole transaction was based on one common understanding, and if Dr. *Gray* is Bishop of *Cape Town* at all, if Dr. *Colenso* is the Bishop of *Natal*, they must be held both of them to have fully consented to and recognized all parts of the understanding and of the form in which their appointment as Bishops was carried out. To say that the Bishop of *Cape Town* has consented to an appeal to the Crown, is inconsistent with the argument that the Bishop of *Natal* did not consent to the jurisdiction pointed out by the Letters Patent. Nothing is contained in the Letters Patent giving an

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appeal to the Crown direct, and if the Crown has not consented to such appeal, it cannot be constituted by the private agreement of a third party.

Thirdly, has the Crown original jurisdiction in the matter, visitorial or otherwise? That question raises this point: Over whom could the Crown exercise the visitorial jurisdiction which it is suggested that it possessed? Is it over the Bishop of *Natal*? Clearly not, for over him the Crown has appointed the Bishop of *Cape Town* for Visitor. Is it over the Bishop of *Cape Town*? No, for the Letters Patent no less expressly declared that he should be subject to the jurisdiction of the Archbishop of *Canterbury*. Any original jurisdiction which the Crown may have possessed under the Statute, 26th *Hen. VIII.* c. 1. no longer exists. That Statute has been repealed. The Statute, 1 *Eliz.* c. 1, s. 17, does nothing more than affirm that all jurisdiction must emanate from the Crown and not from any Foreign power. It is not by way of original jurisdiction, but flowing from the Crown through the regular Courts of the realm. To support such an original jurisdiction, this extravagant proposition must be maintained, that the Crown has, *proprio vigore*, authority to try the Bishop of *Natal* or the Bishop of *Cape Town* for heresy.

Mr. *W. M. James*, Q.C., in reply:

No consensual jurisdiction was created by the Letters Patent. The contract entered into was nothing more than that the parties, to whom the Letters Patent were addressed, agreed to obey the laws of the Anglican Church. Now, with respect to the argument of the other side, that the Queen was not Visitor of the Bishops of *Cape Town* and *Natal*, because Visitors had been specially appointed, we

submit, as all constitutional writers have admitted, that the Sovereign is the supreme Visitor ; Visitor ordinary and governor of the Church, to redress and repress all abuses, anomalies, and wrongs. A grave mistake is made when *Natal* is treated as a conquered country. The government of *Natal* was established by force of the Act, 6th & 7th *Vict.* c. 13. The parliamentary papers, 1847-8, show that *Natal* was not a conquered, but a settled Colony. The Letters Patent issued in 1844, effecting the annexation of the District of *Natal*, stipulate that no Court or Magistrate within the Cape of *Good Hope* should acquire, hold, or exercise any jurisdiction within the Colony of *Natal*, which was thus made independent of *Cape Town*, with the view of giving it a separate government. How, then, can the Bishop of *Cape Town* hold a Court in *Cape Town* for the trial of an offence committed in the independent Settlement of *Natal*? The words of the Letters Patent which confer Metropolitan jurisdiction upon the Bishop of *Cape Town* are,—“ We will and ordain that the Right Rev. Father in God, *Robert Gray*, Bishop of the said See of *Cape Town*, and his successors, the Bishops thereof for the time being, shall be, and be deemed and taken to be, the Metropolitan Bishop in the Colony of the Cape of *Good Hope* and its dependencies, and the Island of *St. Helena* ;” and then it goes on,—“ And we will and ordain that the Bishops of *Graham Town* and *Natal* respectively shall be suffragan Bishops to the said Bishop of *Cape Town* and his successors ; and we will and grant to the said Bishop of *Cape Town*, as Metropolitan of the Cape of *Good Hope* and the Island of *St. Helena*, to perform all functions peculiar and appropriate to the office of Metropolitan within the limits of the said See of *Graham*

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*Town and Natal.*" Now, *Natal* is not one of the dependencies of the Cape of *Good Hope*, and the Metropolitan jurisdiction given over *Natal* was expressly given only to be exercised within the limits of *Natal*. This, therefore, was strictly a visitorial jurisdiction. It is one of the first principles of Ecclesiastical law, that where any power of visitation is given to an Ecclesiastic as an Ordinary, his authority is subject to an appeal through the recognized Courts of Ecclesiastical jurisdiction. I contend, therefore, that by the Letters Patent visitorial power is given to the Bishop of *Cape Town* over Dr. *Colenso*, in accordance with the English law as to Ecclesiastical corporations, which visitorial power he could exercise only within the limits of *Natal*, and subject to appeal to the Crown. Under the authority of the Letters Patent, a general superintendence is granted to the Archbishop of *Canterbury*; but he was not constituted a general appellate Judge. If he were, how could he exercise his jurisdiction? Has he ever accepted the burden of such a jurisdiction? And if he were to pass sentence on the Bishop of *Natal*, how could the sentence be enforced?

Then as to the argument that the Appellant ought to have sought redress in the local Civil Courts. He might, indeed, have applied, not appealed, to one of those Courts for a Prohibition; but the propriety of the decision of the Court could in no way be tried there. Another point also arises, was he to go to the Court of *Natal* or of *Cape Town*? What jurisdiction could the Court of *Natal* exercise over proceedings in *Cape Town*, or the Court of *Cape Town* over proceedings in *Natal*? There has been no instance in the Church, before the case of *Lucy v. Watson (a)*, of the deprivation of a

(a) 1 Ld. Raym. 539.

Bishop by an Archbishop. It is the clear doctrine of the Church, that no Bishop could be deprived, *sine auctoritate sanctæ sedis*. The cases of Bishops, *Bonner* and *Gardiner* support this. The real effect of the Statutes of *Henry* the Eighth and *Elizabeth* was to put the Sovereign into the Pope's place as head of the Church. The decision in *Lucy v. Watson* supports the royal prerogative.

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On the other side, it is contended, that the Bishop of *Natal* held precisely the same relative position to the Bishop of *Cape Town* as the Bishop of *London* to the Archbishop of *Canterbury*. But how could the Bishop of *London* be deprived? Not by the Archbishop of *Canterbury*, but by a competent Court exercising justice on the Queen's behalf, and from whence there would be a direct appeal. How, then, is the Bishop of *Natal* subject and subordinate to the Bishop of *Cape Town*, in the same manner as a suffragan of the Diocese of *Canterbury* is to his Metropolitan, when the Bishop of *Cape Town* could hold no complete Court? In the Roman Catholic Church, a charge of heresy requires a solemn form of trial by Council, to be ratified by the Pope, and, in our Church, it must be tried by the Queen, in Her Visitorial capacity, issuing a Commission. The Statute abolishing the High Commission Court has really no bearing upon the question, for that Court was only abolished so far as it was a Court which had the power of inflicting punishments and fines, and it was only so far a statutory Court. This, therefore, in no way interfered with Ecclesiastical Commissions proper; and, as a matter of fact, various Commissions have, since the days of *Charles* the First, been issued by the Crown. Therefore, we insist, that the Appellant has a right to appeal to the Queen in Council on the grounds, first, as a matter of legal

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jurisdiction; secondly, as a matter of jurisdiction according to the discipline of the Church of *England*, in force in the Colonies; third, as in this case it is a dispute between two officers of the Crown; and, fourthly, as a matter affecting the Queen Herself and Her relations with the Bishop of *Natal*, not perhaps a strict legal right, but we claim on both public and private grounds to have the relation determined in the most effectual manner; and trust that your Lordships will advise Her Majesty to declare that the proceedings at *Cape Town* are null and void, and that the Letters Patent of the Bishop of *Natal* are in full force and vigour. If you do not think proper to adopt that course, then in the alternative to advise Her Majesty to hear the matter fully on its merits.

20th March,  
 1865.

Judgment was reserved, and now delivered by

The LORD CHANCELLOR.

The Bishop of *Natal* and the Bishop of *Cape Town* (who are the parties to this proceeding) are ecclesiastical persons who have been created Bishops by the Queen, in the exercise of Her authority as Sovereign of this realm and head of the Established Church.

These Bishops were consecrated under mandate from the Crown by the Archbishop of *Canterbury*, in the manner prescribed by the law of *England*.

They received and hold their Dioceses under grants made by the Crown. Their *status*, therefore, both ecclesiastical and temporal, must be ascertained and defined by the law of *England*; and it is plain that their legal existence depends on acts which have no validity or effect, except on the basis of the supremacy of the Crown.

Further, their respective and relative rights and liabilities must be determined by the principles of

English law applied to the construction of the grants to them contained in the Letters Patent; for they are the creatures of English law, and dependent on that law for their existence, rights, and attributes.

We must treat the parties before us as standing on this foundation, and on no other.

The Letters Patent by which Dr. *Gray* was appointed Bishop of *Cape Town* and also Metropolitan, passed the Great Seal on the 8th of *December*, 1853. These Letters Patent recited, among other things, that it had been represented to Her Majesty by the Most Reverend Father in God *John Bird*, by Divine Providence Lord Archbishop of *Canterbury*, that the then existing See or Diocese of *Cape Town* was of inconvenient extent, and “that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of *England* and *Ireland* within our said Colony of the *Cape of Good Hope* and its dependencies, and our Island of *Saint Helena*,” it was desirable and expedient that the same should be “divided into three (or more) distinct and separate Sees or Dioceses, to be styled the Bishopric of *Cape Town*, the Bishopric of *Graham’s Town*, and the Bishopric of *Natal*—the Bishops of the said several Sees of *Graham’s Town* and *Natal* and their successors to be subject and subordinate to the See of *Cape Town*, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of *Canterbury* was under the authority of the Archiepiscopal See of that Province and the Archbishop of the same;” and the Letters Patent contained the following passages:—

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“And we do further will and ordain that the said Right Reverend Father in God, *Robert Gray*, Bishop of the said See of *Cape Town*, and his successors the Bishops thereof for the time being, shall be, and be deemed and taken to be, the Metropolitan Bishop in our Colony of the *Cape of Good Hope* and its dependencies, and our Island of *Saint Helena*, subject, nevertheless, to the general superintendence and revision of the Archbishop of *Canterbury* for the time being, and subordinate to the Archiepiscopal See of the Province of *Canterbury*: and we will and ordain that the said Bishops of *Graham's Town* and *Natal* respectively shall be Suffragan Bishops to the said Bishop of *Cape Town* and his successors. And we will and grant to the said Bishop of *Cape Town* and his successors full power and authority as Metropolitan of the *Cape of Good Hope*, and of the Island of *Saint Helena*, to perform all functions peculiar and appropriate to the office of Metropolitan within the limits of the said Sees of *Graham's Town* and *Natal*, and to exercise Metropolitan jurisdiction over the Bishops of the said Sees and their successors, and over all Archdeacons, Dignitaries, and all other Chaplains, Ministers, Priests, and Deacons in Holy Orders of the United Church of *England* and *Ireland* within the limits of the said Dioceses. And we do by these presents give and grant unto the said Bishop of *Cape Town* and his successors full power and authority to visit once in five years, or oftener if occasion shall require, as well the said several Bishops and their successors, as all Dignitaries, and other Chaplains, Ministers, Priests, and Deacons in Holy Orders of the United Church of *England* and *Ireland* resident in the said Dioceses, for correcting and supplying the

detects of the said Bishops and their successors, with all and all manner of visitorial jurisdiction, power, and coercion.

“And we do hereby authorize and empower the said Bishop of *Cape Town* and his successors to inhibit during any such visitation of the said Dioceses the exercise of all or of such part or parts of the ordinary jurisdiction of the said Bishops, or their successors, as to him the said Bishop of *Cape Town* or his successors shall seem expedient, and during the time of such visitation to exercise by himself or themselves, or his or their Commissaries, such powers, functions, and jurisdictions in and over the said Dioceses as the Bishops thereof might have exercised if they had not been inhibited from exercising the same.

“And we do further ordain and declare, that if any person against whom a judgment or decree shall be pronounced by the said Bishops or their successors, or their Commissary or Commissaries, shall conceive himself to be aggrieved by such sentence, it shall be lawful for such person to appeal to the said Bishop of *Cape Town* or his successors, provided such appeal be entered within fifteen days after such sentence shall have been pronounced.

“And we do give and grant to the said Bishop of *Cape Town* and his successors full power and authority finally to decree and determine the said appeals.

“And we do further will and ordain that in case any proceeding shall be instituted against any of the said Bishops of *Graham's Town* and *Natal*, when placed under the said Metropolitan See of *Cape Town*, such proceedings shall originate and be carried on before the said Bishop of *Cape Town*, whom we hereby authorize and direct to take cognizance of the same.

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“And if any party shall conceive himself aggrieved by any judgment, decree, or sentence pronounced by the said Bishop of *Cape Town* or his successors, either in case of such review or in any cause originally instituted before the said Bishop or his successors, it shall be lawful for the said party to appeal to the said Archbishop of *Canterbury* or his successors, who shall finally decide and determine the said appeal.”

The Letters Patent which constituted the See of *Natal* and appointed the Appellant to that See were sealed, and bear date on the 23rd of *November*, 1853, fifteen days before the grant of the Letters Patent to the Bishop of *Cape Town*.

The Letters Patent creating the See of *Natal* recited the Patent of *September*, 1847, which created the original Diocese of *Cape Town*, and appointed Dr. *Gray* the Bishop thereof, and that he had since resigned the office of Bishop of *Cape Town*, whereby the said See had become, and was then, vacant. The Patent also recited that it was expedient and desirable that the said Diocese should be divided into three or more distinct and separate Dioceses, to be styled the Bishoprics of *Cape Town*, *Graham's Town*, and *Natal*, the Bishops of the said several Sees of *Graham's Town* and *Natal* to be subject and subordinate to the See of *Cape Town*, and the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of *Canterbury* was under the authority of the Archiepiscopal See of that Province and the Archbishop of the same; and the Letters Patent proceeded to erect, found, make, ordain, and constitute the District of *Natal* to be a distinct and separate Bishop's See and Diocese, to be called the Bishopric of *Natal*. And after appointing Dr. *Colenso* to be the Bishop of the said See,

and granting that the said Bishop of *Natal* and his successors should be a body corporate, the Letters Patent contained the following passage:—

“And we do further ordain and declare that the said Bishop of *Natal* and his successors shall be subject and subordinate to the see of *Cape Town*, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of *Canterbury*, in our Kingdom of England, is under the authority of the Archiepiscopal See of that Province, and of the Archbishop of the same: and we do hereby further will and ordain that the said *John William Colenso*, and every Bishop of *Natal*, shall, within six months after the date of their respective Letters Patent, take an oath of due obedience to the Bishop of *Cape Town*, for the time being, as his Metropolitan, which oath shall and may be ministered unto him by the said Archbishop, or by any person by him duly appointed or authorized for that purpose.”

The Letters Patent then proceeded to confer on the Bishop of *Natal* and his successors, Episcopal jurisdiction and authority over all Rectors, Curates, Ministers, Chaplains, Priests, and Deacons within the Diocese, and directed that, if any party should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of *Natal* or his successors, he should have an appeal to the Bishop of *Cape Town*, who should finally decide and determine the appeal.

Under these Letters Patent, the Appellant was consecrated on the 30th of *November*, 1853, and he took an oath of canonical obedience to the Metropolitan Bishop of *Cape Town*, which oath was ad-

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ministered to him by the Archbishop of *Canterbury*, and was in these words:—"I, *John William Colenso*, Doctor in Divinity, appointed Bishop of the See and Diocese of *Natal*, do profess and promise all due reverence and obedience to the Metropolitan Bishop of *Cape Town* and to his successors, and to the Metropolitan Church of *St. George, Cape Town*." At this time there was not in reality any Metropolitan See of *Cape Town*, or any Bishop thereof, in existence.

These several Letters Patent were not granted in pursuance of any Orders or Order made by Her Majesty in Council, nor were they made by virtue of any Statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the Cape of *Good Hope* or of the Legislative Council of *Natal*.

Previously to these Letters Patent being granted the District of *Natal* had been erected into a distinct and separate Government; and, by Letters Patent granted by the Crown in 1847, it was ordained that it should have a Legislative Council which should have power to make such Laws and Ordinances as might be required for the peace, order, and good government of the District. With respect to the *Cape of Good Hope*, by Letters Patent, dated the 23rd of *May*, 1858, it was declared and ordained by Her Majesty, that there should be within the Settlement of the *Cape of Good Hope* a Parliament which should be holden by the Governor, and should consist of the Governor, a Legislative Council, and a House of Assembly, and that such Parliament should have authority to make laws for the peace, welfare, and good government of the Settlement.

In the year 1863, certain charges of heresy and false doctrine were preferred against the Appellant before the Bishop of *Cape Town* as Metropolitan, and, upon these charges, the Bishop of *Cape Town*, claiming to exercise jurisdiction as Metropolitan, did, on the 16th day of *December*, 1863, sentence, adjudge, and decree the Appellant, the Bishop of *Natal*, to be deposed from his office as such Bishop, and to be further prohibited from the exercise of any Divine office within any part of the Metropolitan Province of *Cape Town*. In pronouncing this decree, the Bishop of *Cape Town* claimed to exercise jurisdiction as Metropolitan by virtue of his Letters Patent, and of the office thereby conferred on him, and as having thereby acquired legal authority to try and condemn the Appellant; and the Appellant protested against such assumption of jurisdiction.

This sentence and decree of Dr. *Gray*, as Metropolitan, has been published and promulgated in the Diocese of *Natal*, and the Clergy of that Diocese have been thereby prohibited from yielding obedience to the Appellant as Bishop of *Natal*.

In this state of things three principal questions arise, and have been argued before us: First, were the Letters Patent of the 8th of *December*, 1853, by which Dr. *Gray* was appointed Metropolitan, and a Metropolitan See or Province was expressed to be created, valid and good in law? Secondly, supposing the ecclesiastical relation of Metropolitan and Suffragan to have been created, was the grant of coercive authority and jurisdiction expressed by the Letters Patent to be thereby made to the Metropolitan valid and good in law? Thirdly, can the oath of canonical obedience taken by the Appellant to the

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Bishop of *Cape Town*, and his consent to accept his See as part of the Metropolitan Province of *Cape Town*, confer any jurisdiction or authority on the Bishop of *Cape Town* by which this sentence of deprivation of the Bishopric of *Natal* can be supported?

With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent Legislature in the Settlements of the *Cape of Good Hope* and *Natal*, there was no power in the Crown by virtue of its Prerogative (for these Letters Patent were not granted under the provisions of any Statute) to establish a Metropolitan See or Province, or to create an Ecclesiastical Corporation whose *status*, rights, and authority the Colony could be required to recognize.

After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom.

It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop, but it has no power to assign him any Diocese, or give him any sphere of action within the United Kingdom. The United Church of *England* and *Ireland* is not a part of the constitution in any Colonial Settlement, nor can its authorities or those who bear office in it claim to be recognized by the law of the Colony, otherwise than as the members of a voluntary association.

The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions. In the year 1813 it was deemed expedient to establish a Bishopric in the *East Indies* (then

under the Government of the East India Company); and although the Bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the Legislature, and that an Act of Parliament should be passed to give the Bishop legal *status* and authority. Accordingly, by Statute, 53rd *Geo.* III. c. 155, sec. 49, it was enacted, that in case it should please His Majesty, by his Royal Letters Patent, to erect, found, and constitute one Bishopric for the whole of the British territories in the *East Indies* and parts therein mentioned, a certain salary should be paid to the Bishop by the East India Company, and by the 51st and 52nd sections it was enacted, that such Bishop should not have or use any jurisdiction, or exercise any episcopal functions whatsoever but such as should be limited to him by Letters Patent, and that it should be lawful for His Majesty by Letters Patent to grant to such Bishop such Ecclesiastical jurisdiction and the exercise of such episcopal functions within the *East Indies* and parts aforesaid as His Majesty should think necessary for administering holy ceremonies, and for the superintendence and good government of the Ministers of the Church establishment within the *East Indies* and parts aforesaid. Subsequently, in the year 1833, it was deemed right to found two additional Bishoprics, one at *Madras*, and the other at *Bombay*; and again, an Act of Parliament (3rd & 4th *Will.* IV. c. 85) was passed, by the 93rd section of which it was enacted, in like manner, that the Crown should have power to grant such Bishops within their Dioceses Ecclesiastical jurisdiction; and it was also enacted and declared that the Bishop of *Calcutta* should be Metropolitan in *India*, and

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should have as such all such jurisdiction as the Crown should by Letters Patent direct, subject, nevertheless, to the general superintendence and revision of the Archbishop of *Canterbury*; and it was provided that the Bishops of *Madras* and *Bombay* should be subject to the Bishop of *Calcutta* as Metropolitan, and should take an oath of canonical obedience to him.

So again, when in 1824 a Bishop was appointed in *Jamaica* by Letters Patent containing clauses similar to those which are found in the Letters Patent to the present Appellant, it was thought necessary that the legal *status* and authority of the Bishop should be confirmed and established by an Act of the Colonial Legislature. The consent of the Crown was given to this Colonial Act, which would have been an improper thing, as an injury to the Crown's prerogative, unless the Law advisers of the Government had been satisfied that the Colonial Statute was necessary to give full effect to the establishment of the Bishopric.

The conclusion is further confirmed by observing the course of Imperial legislation on the same subject, namely, the creation of new Bishoprics in *England*.

When four new Bishoprics were constituted by *Henry VIII.*, it appears to have been thought necessary, even by that absolute Monarch, to have recourse to the authority of Parliament, and the Act that was passed (viz., the 31st *Hen. VIII.* c. 9, which is not found in the ordinary edition of the Statutes) is of a singular character. After referring to the slothful and ungodly life which had been used among all those which bore the name of religious folk, and reciting that it was thought, therefore, unto the King's Highness most expedient and necessary that more Bishoprics, Collegiate and Cathedral Churches should be established,

it was enacted, that His Highness should have full power and authority, from time to time, to declare and nominate by his Letters Patent or other writing to be made under his Great Seal, such number of Bishops, such number of cities, Sees for Bishops, Cathedral Churches, and Dioceses by metes and bounds, for the exercise and ministration of their episcopal offices and administration as shall appertain, and to endow them with such possessions after such manner, form, and condition as to His most excellent wisdom shall be thought necessary and convenient.

This Statute, which was repealed by the 1st & 2nd of *Philip & Mary*, c. 8, sec. 18, does not appear to have been revived. It is remarkable as granting power to nominate and appoint new Bishops as well as to create new Sees and Dioceses.

So also in recent times the two new Bishoprics of *Manchester* and *Ripon* were constituted, and the new Bishops received Ecclesiastical jurisdiction, under the authority of an Act of Parliament. It is true that it has been the practice for many years to insert in Letters Patent creating Colonial Bishoprics, clauses which purport to confer Ecclesiastical jurisdiction; but the forms of such Letters Patent were probably taken by the official persons who prepared them from the original forms used in the Letters Patent appointing the East Indian Bishops, without advertg to the fact that such last-mentioned Letters Patent were granted under the provisions of an Act of Parliament.

We, therefore, arrive at the conclusion that although in a Crown Colony, properly so called, or in cases where the Letters Patent are made in pursuance of the authority of an Act of Parliament

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(such for example as the Act of the 6th & 7th *Vict.* c. 13), a Bishopric may be constituted and Ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the Letters Patent of the Crown will not have any such effect or operation in a Colony or Settlement which is possessed of an independent legislature.

The subject was considered by the Judicial Committee in the case of *Long v. The Bishop of Cape Town* (1 Moore's P. C. Cases, N. S. 411), and we adhere to the principles which are there laid down.

The same reasoning is of course decisive of the second question, whether any jurisdiction was conferred by the Letters Patent. Let it be granted or assumed that the Letters Patent are sufficient in law to confer on Dr. *Gray* the Ecclesiastical *status* of Metropolitan, and to create between him and the Bishops of *Natal* and *Graham's Town* the personal relation of Metropolitan and Suffragan as Ecclesiastics, yet it is quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over the Suffragan Bishops, or over any other person.

It is a settled constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord *Coke* in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament.

It cannot be said that any Ecclesiastical Tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church, and in the

case of a settled Colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country.

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So much of the Letters Patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law as declared and established by that part of the Act of the 16th *Car.* I. c. 11, which remains unrepealed by the 13th *Car.* II. St. II., c. 12. It may be useful to state this in detail. By the 16th and 17th sections of the 1 *Eliz.* c. 1, entitled "An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same," it was enacted, that all usurped and Foreign power and authority, spiritual and temporal, should for ever be extinguished within the Realm, and, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been, or might lawfully be exercised or used for the visitation of the Ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, should for ever be united and annexed to the Imperial Crown of this Realm. And by the 18th section the Queen was empowered by Letters Patent to appoint persons to exercise, occupy, use, and execute all manner of Spiritual or Ecclesiastical jurisdiction within the realms of *England* and *Ireland*, or any other the dominions and countries of the Crown.

Under this Statute the High Commission Court

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was erected, which was abolished by the 16th *Car. I.* c. 10.

By the Act of the 16th *Car. I.* c. 11, the 18th section of the 1 *Eliz.* c. 1, was wholly repealed, and by the 4th section of the same Statute all spiritual and ecclesiastical persons or Judges were forbidden under severe penalties to exercise any jurisdiction or coercive legal authority, an enactment which closed all the regular Established ecclesiastical Tribunals; but by the 13th *Car. II.* c. 12, the ordinary Ecclesiastical jurisdiction and authority, as it existed before the year 1639, was with certain savings restored to the Archbishops and Bishops; and the Act of the 16th *Car. I.*, excepting what concerned the High Commission Court or the erection of any such like Court by Commission, was repealed, but with a proviso that nothing should extend or be construed to revive or give force to the enactments contained in the 18th section of the 1 *Eliz.* c. 1, which should remain and stand repealed.

There is, therefore, no power in the Crown to create any new or additional ecclesiastical Tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the Appellant and Respondent, are simply void in law. No Metropolitan or Bishop in any Colony having legislative institutions can, by virtue of the Crown's Letters Patent alone (unless granted under an Act of Parliament, or confirmed by a Colonial Statute), exercise any coercive jurisdiction, or hold any Court or Tribunal for that purpose.

Pastoral or spiritual authority may be incidental to the office of Bishop, but all jurisdiction in the Church,

where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs, and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority.

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Third. If, then, the Bishop of *Cape Town* had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of *Natal*?

There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience, taken by the Bishop of *Natal* to Dr. *Gray* as Metropolitan.

The argument must be, that both parties being aware that the Bishop of *Cape Town* had no jurisdiction or legal authority as Metropolitan, the Appellant agreed to give it to him by voluntary submission.

But even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of *Natal* to give, or to the Bishop of *Cape Town* to accept or exercise, any such jurisdiction.

There remains one point to be considered. It was contended before us that if the Bishop of *Cape Town* had no jurisdiction, his judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council.

But that is by no means the consequence of holding that the Respondent had no jurisdiction. The Bishop of *Cape Town*, acting under the authority which the Queen's Letters Patent purported to give, asserts that he has held a Court of Justice, and that with certain legal forms he has pro-

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nounced a judicial sentence, and that by such sentence he has deposed the Bishop of *Natal* from his office of Bishop, and deprived him of his See. He also asserts that the sentence having been published in the Diocese of *Natal*, the Clergy and inhabitants of that Diocese are thereby deprived of all Episcopal superintendence. Whether these proceedings have the effect which is attributed to them by the Bishop of *Cape Town*, is a question of the greatest importance, and one which we feel bound to decide. We have already shown that there was no power to confer any jurisdiction on the Respondent as Metropolitan. The attempt to give appellate jurisdiction to the Archbishop of *Canterbury* is equally invalid.

This important question can be decided only by the Sovereign as head of the Established Church and depository of the ultimate appellate jurisdiction.

Before the Reformation, in a dispute of this nature between two independent Prelates, an appeal would have lain to the Pope ; but all appellate authority of the Pope over members of the Established Church is by Statute vested in the Crown.

It is the settled prerogative of the Crown to receive appeals in all Colonial causes, and by the 25th *Hen. VIII. c. 19* (by which the mode of the appeal to the Crown in Ecclesiastical causes is directed), it is by the 4th section enacted, that " for lack of justice at or in any of the Courts of the Archbishops of this Realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery," an enactment which gave rise to the Commission of Delegates, for which this Tribunal is now substituted.

Unless a controversy, such as that which is presented by this appeal and petition, falls to be determined by the ultimate jurisdiction of the Crown, it is plain that there would be a denial of justice, and no remedy for great public inconvenience and mischief. It is right to add, although unnecessary, that by the Act, 3rd & 4th *Will.* IV. c. 41, which constituted this Tribunal, Her Majesty has power to refer to the Judicial Committee for hearing or consideration any such other matters whatsoever as Her Majesty shall think fit, and this Committee is thereupon to hear or consider the same, and to advise Her Majesty thereon; and that on the 10th of *June*, 1864, it was ordered by Her Majesty in Council that the petition and supplemental petition of the Appellant should be, and the same were, thereby referred to this Committee, to hear the same and report their opinion thereupon to Her Majesty.

Their Lordships, therefore, will humbly report to Her Majesty their judgment and opinion that the proceedings taken by the Bishop of *Cape Town*, and the judgment or sentence pronounced by him against the Bishop of *Natal*, are null and void in law.

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ON APPEAL FROM THE SUPREME COURT  
OF NEW SOUTH WALES.

ESTEBAN DE COMAS - - - *Appellant,*

AND

JACOBUS CORNELUS PROST AND }  
GEORGE CHARLES ADOLPHUS KÖHLER } *Respondents.\**

13th March,  
1865.

Mere advances made by a Factor, whether at the time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement

that the authority shall not be revocable.

Whether such an agreement has been made, or may be properly inferred, is a question upon the evidence for the jury.

So held in an action for damages for an alleged improper sale by the Defendants of certain sugars placed in their hands by the Plaintiff.

The Judge directed the jury that, by the mere relationship of Factor, the Factor did not by making advances, acquire any right in derogation of the rights of his principal to give directions as to the time and manner of sale, and that any such right on the part of the Factor must be made out by an agreement which might be inferred from the evidence, or might be implied by the proof of usage. Held that there was no misdirection.

THIS was an action brought by the Appellant, a Spanish Merchant at *Manilla*, who traded at *Sydney* in *New South Wales*, against the Respondents, Dutch merchants and brokers, carrying on business at *Sydney*, to recover damages for an alleged improper sale by the Respondents of certain sugars belonging to the Appellant.

The declaration contained four counts. The first count stated, that the Defendants were employed by the Plaintiff to sell certain sugars, and promised to

\* Present: Lord Kingsdown, Sir Edward Ryan, and Sir Edward Vaughan Williams.

do so with due care and diligence, and alleged as a breach, unreasonable delay in the sale. The second count stated, that the Defendants undertook to obey the Plaintiff's orders, and alleged as a breach that they sold the sugars contrary to such orders, and at prices below those named by the Plaintiff. The third count was in trover; and the fourth count for money had and received.

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The Defendants pleaded to the first count, a traverse of the breach; to the first and second counts, *non assumpsit*, and to the second count, a special plea that the sugar was delivered to the Defendants as Factors, and that at the time of delivery and before the orders were given, the Plaintiff authorised the Defendants to sell at their discretion; that thereupon, in consideration of the Defendants making payments and advances, the Plaintiff promised not to revoke the authority to sell; that the Defendants made certain advances, and before the orders were given, required repayment, and the Plaintiff not paying within a reasonable time, the Defendants sold the sugars, and that the amount realized was insufficient to repay the advances. To the third count they pleaded, not guilty and not possessed; and to the fourth count, never indebted. The Defendants pleaded a further plea to the second count, alleging that the agreement not to revoke the Defendants' authority to sell was made after delivery, and while the sugar was in the possession of the Defendants as Factors for sale; but the other averments, were similar to the third plea.

It was agreed at the trial that both these pleas should be taken as having been also pleaded to the trover count.

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The action was tried before Mr. Justice *Wise* and a jury of four.

The leading facts given in evidence, were these:—The Appellant, as before stated, was a Spanish Merchant, residing at *Manilla*, and the Respondents were Dutch Merchants, carrying on business at *Sydney*, in *New South Wales*. On the 26th of *September*, 1860, a correspondence was opened between the Appellant and the Respondents by a letter from the Respondents with regard to certain consignments which they recommended the Appellant to make from the *Philippine* Islands for the *Sydney* market. They mentioned sugar as the principal article, and one which they had peculiar facilities for disposing of. In the same letter they offered their services to the Appellant, and pressed him to send them a consignment. In subsequent letters quotations were made of the prices of the day, and the Respondents informed the Appellant that from 150 to 200 tons of sugar per month would find buyers at prices that would leave a good profit. Accordingly, in the month of *June*, 1861, the Appellant shipped a quantity of sugars at *Manilla* and *Iloilo* in the *Philippine* Islands on board the American barque "*Rosette*," for *Sydney*, and sailed in the same vessel as supercargo. That vessel having received damage in the course of her voyage, put into *Batavia* in distress about the end of *September*, 1861. The cargo was there unloaded and placed in store. A portion of the sugars that had been damaged was sold, but the greater part was finally reshipped on board the Dutch ship "*Voornit*." To pay the expenses of repairs and of the unloading and reloading of the cargo, the latter was hypothecated by the Captain of the "*Rosette*" to certain Dutch Merchants at *Batavia*.

for the sum of £1,070. The Captain delivered to them, at the same time, the Bills of lading of the cargo by the "*Voornit*," together with the hypothecation bond, and also a draft by himself upon their agents at *Sydney*, Messrs. *Griffiths, Fenning, & Co.*, for the sum of £1,074. These documents were transmitted direct to *Sydney*, with instructions to obtain payment of the amount from the owners of the cargo there, and to retain the bond and Bills of lading as security for the repayment. The "*Voornit*" arrived at *Sydney* with the cargo of the "*Rosette*" on the 1st of *May*, 1862, when Messrs. *Griffiths, Fenning, & Co.*, having received the above instructions with the draft for £1,074 and the hypothecation bond and Bills of lading, demanded payment from the owners of the cargo of the amount of the advances. The Plaintiff, who also arrived in the same ship with the sugars, was at this time the holder of the original Bills of lading by the "*Rosette*" of the sugars which had been shipped by him, and the proportionate share of the advances falling upon his sugars amounted to £231. He, however, disputed his liability to pay this sum, and made counter claims against the master and owners of the "*Rosette*." The owners of the residue of the cargo admitted their liability, and paid their share of the amount. A discussion then arose between the Plaintiff and the parties making the above claim, respecting the Plaintiff's rights and liabilities generally in relation to the transaction, the result of which was that those parties refused to deliver the sugars to him without payment of the sum of £231. The Plaintiff thereupon applied to the Defendants for assistance; and it was then verbally proposed by the Plaintiff to the Defendants, that they

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should advance the necessary moneys to release the sugars from the hypothecation, and should also pay the freight and other charges, and that the Defendants should act as his Agents for the sale of the sugars.

It was not perfectly clear from the evidence what were the precise terms of these verbal communications, as neither of the parties was familiar with any language spoken by the other. It appeared, however, from the evidence of one of the Defendants, *Prost*, that he required the Plaintiff to reduce them to writing; and accordingly, before anything was done by either party, on the 3rd of *May*, 1862, a letter in the Spanish language, of which the following was the translation, and which was given in evidence, was delivered by the Plaintiff to the Defendants at *Sydney*:—" *Prost & Co.* According the offer I have made to your to consign on yours the portion I shipped in *Iloilo* on board of the American barque '*Rosette*,' which in *Batavia* was transhipped to the Dutch vessel '*Voornit*,' that arrived in this port on the 1st day of the present month. In the 4,217 *piculs* and 93 *catties* of sugar, unrefined, composing the cargo, 669 *piculs* and 63 *catties* are sun dried, as yours can see in the Bill of lading which I send to yours endorsed, and the same circumstance appear too in the facture that I also subjoin. All the sugar was of the best quality, in *Iloilo* and *Negros*; but if, when discharging, yours notice any difference of kinds (that should be motived principally) for the accidents of the voyage. I wish leave on yours hands the care of to be separate, and place in lots, if yours consider it more advantageous for the sale. Also I leave to yours to realize the sale of the article, in the manner and opportunity that yours think the best according the state of the

market, putting it in public auction, as is usual, or selling by private contract. When yours acknowledged to have received this letter, I beg yours the kindness of tell me whether is custom here to sell on bills payable at certain term, or in ready cash, and if there is opportunity of take draughts against accredited houses in *Hong Kong*, adding how much is discounted in sales effected at cash down. Having had a forced arrival in *Batavia*, damages on the cargo, and a change of vessel, I recommend to yours the greatest cares in this affair. The commission for sale, according, was agreed between I and yours, would be  $2\frac{1}{2}$  per cent. Be kind enough to send me back the facture, as soon as yours not want it any more.—I remain, yours truly, *Esteban de Comas*."

On the 6th of *May* following, the Respondents having acceded to the terms of this letter, advanced and paid for the Appellant to the holders of the hypothecation Bond, the sum of £231, which was his share of the advances. They also paid the freight upon the sugar, amounting to about £800, and obtained possession of the goods.

On the 10th of *July*, 1862, the Appellant sent another letter to the Respondent's firm, containing, as translated, this passage, " Nevertheless if you consider it advisable to make a trial or require to reimburse yourselves the advances you have made, you are at liberty to do what you think fit ;" and on the 21st of *July*, 1862, the Appellant wrote another letter to the Respondents, which, when translated, was in part, and as far as is necessary to state, as follows:— " Within eight or ten days I must pay about £1,200, value of goods purchased for me, to send its to *Manila* on vessel '*Abisinia*.' As the sugar is not

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yet sold, I cannot go now to *Manila*, and there is not my interest to have money in that port. Why, I have made arrangements in one *Sidney* house of commerce that transact business with *Manila* for receiving here the amount of the cargo, and when sold it to deliver the advance in *Manila*."

The Respondents replied on the same day to this letter as follows:—"In reply to your favor of to-day, in which you ask us for a sum of £1,200, to enable you to pay for goods purchased and shipped to *Manila*, and in accordance with your verbal conversation with our Mr. *Prost* this morning, we beg to inform you that we are willing to pay for those goods on the following conditions, viz.: that you hand us the invoice of such goods, authorizing us to pay the same for your account. We make up an invoice to you, charging you  $2\frac{1}{2}\%$  commission. It is further understood that you will apply to us to have the Marine Insurance effected in our office. The insurance can be effected through *Torres Straits*."

In *August* and *September*, 1862, the price of sugar declined. On the 22nd of *August*, 1862, the Respondents wrote to the Appellant, to the effect, that the amount advanced was in excess of the then value of the sugar, and requesting a cheque for £450 or £500 to cover advances, and on the 27th of the same month the Appellant again wrote to the Respondents, naming the prices which he would be willing to take for the different qualities of the sugars. On the 1st of *September*, 1862, the Respondents wrote to the Appellant that they had had an offer of £20 per ton, duty paid, for the whole. The Appellant wrote on the 2nd of *September* declining the offer of £20 per ton, and stating that he would make arrangements to refund

the advances and dispose of the sugar himself. On the next day the Appellant again wrote to the Respondents, stating that he was then taking steps to refund the advances, and protesting against and forbidding any sale at the price offered. On the same day, however, the Respondents, conceiving that they had a right to sell in order to repay themselves their advances, sold the whole of the sugar, without distinction of quality, at £20 per ton, duty paid.

In answer to a question put by the learned Judge at the trial, it was stated, that the third plea was founded on usage, and the further special plea on the agreement between the parties.

Upon the trial the learned Judge, in summing up to the jury, directed them, as a matter of law, according to *Smart v. Sanders* (5 C. B. Rep. 914), that by the mere relationship of principal and Factor for sale, the latter did not by making advances, either at the time of his employment or subsequently, acquire any right in derogation of the rights of the principal to give directions as to the time and manner of sale, and that any such right on the part of the Factor must be made out by an agreement, which might be inferred from the evidence, or might exist impliedly by proof of usage, and he referred to *Lewis v. Marshall* (7 Man. & Gr. 729); and *Kirchner v. Venus* (12 Moore's P. C. Cases 361); and the jury found, first, that there was no such agreement or usage proved; secondly, that there was unreasonable delay on the part of the Defendants in the sale; thirdly, that the sale was not in the exercise of a sound discretion, and they found that the value of the sugar was £24 per ton.

The learned Judge suggested that the verdict should be entered on the trover count for the full

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value of the sugars, and a nominal verdict on the other counts, and accordingly the verdict was entered for the Plaintiff for £5,280, on the count in trover, and for nominal damages on the special count.

The Respondents then moved for and obtained a rule *nisi* for a new trial on the following grounds:—First, that at the time of the sale, the sugars were in the Respondents' hands as a pledge for the money advances, and that after the demand for repayment they had a right to sell them in order to reimburse themselves; secondly, that the verdict was against the evidence; and thirdly, that the value of the sugars could not be recovered in the action, or at all events, not on the third count, as trover would not lie in a case of this kind; and lastly, that the damages were excessive.

On the 9th of *July*, 1863, the rule was made absolute for a new trial. The Court differed in opinion, the Chief Justice, Sir *Alfred Stephen*, and Mr. Justice *Milford* being of opinion that there should be a new trial, Mr. Justice *Wise* being of a contrary opinion, and expressing himself as being satisfied with the verdict. The principal ground for the decision appears from the following judgment of the Chief Justice:—"The substantial question in the case is, whether the Defendants did or did not receive from the Plaintiff, by the letter of the 3rd of *May*, 1862, taken alone, or in connexion with the conversations which preceded it, an absolute authority, irrevocable, to sell the sugars (or such portion of them as should be necessary), in order to repay themselves the amount of their first advance; and my opinion is, that they did receive such an authority. If the Defendants occupied simply the

position of Factors, with no other contract or super-added rights against their principal than such as that position implies, it could not be successfully contended that they had an unqualified power to sell. The case of *Smart v. Sandars* (5 C. B. Rep. 914) would be a distinct decision against the claim, which must be founded on special contract only, or on general and common usage, which itself would be evidence of a contract. But here the Defendants, before they accepted the employment of agents for sale, were asked to supply the Plaintiff with means to enable him (or them, as such agents) to obtain possession of the goods. He was not at that time, I take it, nor until payment of the hypothecation, even qualifiedly their owner. But, however this may be, the Plaintiff could only obtain the goods by a payment which he asked the Defendants to make, and they were told, when he definitively offered them the agency, that they might sell the property in such manner and at such time as the Defendants themselves should think best. This, as I understand the matter, was not the mere tender of a Factor's employment on the ordinary terms. For a Factor can only sell subject to his principal's directions, whenever he may think fit to interpose, and subject also to the latter's right at any time wholly to revoke his agent's power. Here, however, adverting to their previous conversation, in which it had been settled that the first necessary step was an advance of money to be made by the Defendants, the Plaintiff leaves to them the decision, although he is himself to remain on the spot, of judging, not only as to the mode, but (having regard to the state of the market) also as to the best time for selling. No distinct reference, it is true, is made in the letter to the proposed advance ; but the

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fact that the making of such an advance formed part of the transaction, is by reference (as it appears to me) incorporated in that letter, and the consideration of such advance obviously was the employment on commission which was offered in that letter, and which had been previously orally offered. And then, I think, that having such a letter before them, and connecting it with the previous conversation and the proposal to them to make that advance, the Defendants were justified in regarding their power of selling, and consequently of reimbursing themselves, as one which was unqualified and absolute, in other words, not liable to any power of revocation. Nor do I find anything inconsistent with this in the circumstance that the Defendants deferred to their principal's wishes in not selling for a certain period below certain prices mentioned by him. Obvious reasons would induce them to do so, while interest on their own advances was accumulating, and delay might appear to them to be safe, if not advantageous. If the opinion thus expressed by me be well founded, the verdict in this case clearly cannot be sustained, even if the Defendants had no right to sell more of the sugars than would suffice to cover their first advance. For the verdict proceeds on the assumption that the Defendants had no right to sell at all, and the full value of the sugars (or in my view of the evidence much more than their value) has accordingly been given. But it is unnecessary to consider the question whether, if that assumption were correct, a verdict for the whole value could be supported, or whether the damages found could not be reduced so as to represent only the amount of the loss actually sustained, for as to the large advance made by the Defendants in *July*, at all events, if not the amount

of the freight also, I am of opinion that the power of sale was equally irrevocable, as with respect to the advance made for relieving the hypothecation. It appears clearly to me, on perusal of the correspondence, that the advance lastly made was on the footing of the first, whatever that may have been, and, therefore, with power to sell irrevocable if the first was made on the faith of such power. It must not be supposed that I conceive these Defendants to have possessed a power to sell, utterly regardless of the markets, and to the Plaintiff's clear injury in that respect. I apprehend that they still remain his agents as to that matter, and would be liable in damages, not, indeed, for violating the Plaintiff's instructions, but for any grossly unreasonable or imprudent sale, as in the case of a Factor employed on the ordinary terms. But here the jury have found not only that there was negligence in delaying the sale, which was not effected until the 3rd of *September*, but that there was no irrevocable power of sale in the Defendants, and that at the time of such the Plaintiff sustained damage by their then prematurely selling after his revocation of their power."

Mr. Justice *Milford* in his judgment said :—" In the present case the Plaintiff in the letter of the 3rd of *May*, 1862, states what the Defendants' duties and rights are to be, and amongst others, the power to sell at the discretion of the Defendants ; but he says nothing about reserving a power to control the sale, which would have been inserted if he had intended to constitute the Defendants, Factors, and nothing else, that being an incident to the authority of a Factor. I, therefore, am of opinion, that it was a wrong finding of the jury, whether properly left to them or not, that

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this power to sell by the Defendants was revocable. Taking this, therefore, as the foundation of the consideration of the rest of the case, let us consider whether the Defendants were justified in selling as they did. They had no right to sell more of the goods in their hands than would produce enough to satisfy the claims they had by reason of the agreement between them and the Plaintiff. It is clear that they had a right to sell enough to cover the expenditure necessary to get the goods into their hands, as the hypothecation Bond, freight, &c. There was, however, a further sum of £1,200, advanced in the month of *July* following, and the question arises whether that was secured in the same way as the first-mentioned sums; and upon reading the letters of the 10th and 21st of that month I am of opinion that it was. The proposal that it should be secured in another way not having been approved by the Defendants, I think those letters show that it was to be secured on the goods in the Defendants' hands, in like manner as the former advances. The Defendants, therefore, had an irrevocable power to sell for reimbursing themselves all their advances, and they did sell, but not to a greater amount than sufficient to cover them. Possibly the property sold did not produce so much as it might have done, but there does not appear to have been any negligence or want of good faith in the Defendants in effecting the sale—they had a right to sell if they wanted the money secured, though there might have been a falling market; in fact, the prices then falling did not recover for a long while, if at all. This, however, if the agreement had been revocable, would have been a matter for the jury, and probably their verdict could

not have been disturbed; but I think there must be a new trial on the first ground. I also am of opinion, that the finding of the jury, under any circumstances, was wrong; for, if the power to sell was revocable, and was revoked, yet the Defendants would be entitled to the advances made, and the expenses incurred by them to be deducted from the amount of the value of the sugar, as estimated by the jury."

Mr. Justice *Wise* stated his opinion as follows:—  
 "It was conceded upon the argument that the contract between the parties not being wholly in writing was a question for the jury, and they having found that the Defendants were mere Factors, and that there had been no special agreement under which they had obtained an irrevocable power to sell the sugar upon nonpayment of these advances, I am unable to say that this finding is so much against the evidence as to justify the setting aside the verdict, especially as it was a mercantile contract upon which the opinion of a jury is entitled to additional weight. It should be remarked also that there were peculiar difficulties in the case, rendering it almost impossible for me to feel satisfied that my notes correctly represented the evidence. The parties were Foreigners, speaking different languages, and having no perfect knowledge of any third language in which they could converse or correspond, and it was necessary to employ a second interpreter to carry on the examination of the Plaintiff. The only translations also of the Spanish letters were those made by the Plaintiff himself, which were anything but clear. The document of *July* 10th is a signal illustration of the obscurity incident to the evidence. The Plaintiff first read a letter in Spanish to the Defendant, *Prost*, who said he did not

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understand it fully, and asked *De Comas* to tell him what he meant, and that he, *Prost*, would write it down, which he did, and then read it over to the Plaintiff. Under these circumstances it was not surprising that the witnesses differed as to how far this memorandum represented their mutual intentions. I certainly was not dissatisfied with the verdict, and was rather inclined to think that it was right. What, then, were the circumstances under which the supposed irrevocable authority was given? The first interview between the parties took place as mentioned in the judgment of his Honor the Chief Justice. It seems to me important to notice particularly the evidence given by each. *De Comas* states, 'I showed *Prost* a sample. I said the commission was to be 2½ per cent. He agreed.' And upon cross-examination he says, 'It is very likely I did say to *Prost* that it was hypothecated. *Prost*, *Fanning*, and *Smith* made an agreement. I approved of the payment. I did not know then that *Prost* was agent for the ship.' *Prost* stated, '*De Comas* saw the hypothecation bond. *De Comas* saw it when the vessel arrived. I told him that we were agents, and, therefore, had got possession of the documents before the arrival of the ship. He said, that he thought that it would have to be paid by the Captain of the '*Rosette*.' I explained to him about the £1,070, that the Bill was drawn by the Captain on Messrs. *Griffiths*, *Fanning*, & Co., here, and hypothecated as security for the payment of the draft. I had several meetings with him and *Smith, Brothers*, who had another part of the cargo. It was agreed that we should pay it, and that *De Comas* should pay his share. They (that is, the documents as to the Bottomry bond) were explained

to him. We understood each other. The Spanish Consul was present.' Cross-examined :—'I explained to him that he could not get his sugar until these were paid. Nothing was said about selling. I told him at first that the market was bad, and he said that he would see.' This is the whole of the evidence of the conversation, the Spanish Consul, who was present, not having been called by either side. Then followed the letter of *May* 3rd, and without any further communication the Defendants paid on the 6th of *May* the Plaintiff's portion of the hypothecation debt. It may be that the parties intended that the Defendants should have something more than a Factor's rights, although the smallness of the amount at this time rather militates against this view ; but it is in my opinion equally probable that the Defendants might have assisted the Plaintiff to pay off the claim for bottomry in the hope of becoming the consignees of so large a cargo depending upon the sale or repayment of their advance, and not expecting that there would be any difference of opinion between themselves and *De Comas* as to the best time and mode of selling. There may have been a conversation between the parties about the sale of the sugar without there being any special agreement to clothe the Defendants with an irrevocable power of sale, and the letter makes no allusion to any such irrevocable authority, and does no more, as it seems to me, than mention at length the ordinary duties of a Factor. Nor is it undeserving of notice, in considering the probabilities of the case, that (although there was no evidence upon this point), according to the authorities cited in *Smart v. Sandars* (5 C. B. Rep. 914), neither by the Dutch nor Spanish law, has a Factor a right to sell goods in his hands to

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repay advances. The irrevocable power of sale is something superadded to the implied rights of a Factor; and, as it seems to me, that much more definite and clear evidence than was adduced in this case is requisite before a Court ought to set aside the verdict of a jury finding that such power was not agreed to be given. With respect to the correspondence and subsequent transactions between the parties, it is sufficient to say that there was nothing amounting to a clear admission by either of what the original contract was. Arguments indeed from the expressions used in the conversation and letters were drawn by the Counsel on each side in favour of their respective views, and both my learned colleagues seem to consider that the subsequent advances were made on the footing of the first, whatever they may have been. I may, however, remark, that having excluded parol evidence with reference to the letter of *July* 21st, and no objection having been made to my ruling, it appears to me that that letter rather favours the view I take, because that transaction seems to have been based upon a specific agreement, not indeed excluding the ordinary lien of a Factor, but not at all necessarily including the power of sale now claimed by the Defendants. With reference to the amount of the verdict, I certainly thought that too high a sum was given by the jury as the value of the sugars. It has occurred to me, indeed, that the jury might have been somewhat influenced by the forced character of the sale rendering it unlikely that the full value would have been obtained, and the absence of Mr. *Mylrea*, through whom the sale took place, at the trial, although no imputation was suggested as to the fairness of the transaction, might also have weighed

with the jury. And as a good deal of evidence was given, and samples of the sugar itself were produced, and a difference between the certificate given by Mr. *Dean* and his evidence at the trial was not in my opinion satisfactorily explained, it would have been a question whether a new trial would have been granted for excessive damages. In consequence, however, of the view taken by the majority of the Court, it became unnecessary to decide that point."

The present appeal was from the judgment making the rule for a new trial absolute.

Mr. *Mellish*, Q.C., and Mr. *Quain*, for the Appellant.

There was no evidence to go to the jury of an irrevocable power of sale given by the Appellant to the Respondents. The letters of the 3rd of *May*, and 10th of *July*, 1862, relied upon by the Respondents, do not import such authority. They amount to nothing more than a principal putting goods into the hands of his Factors for sale with a general lien for the advances. *Smart v. Sandars* (a) is in point. There a Factor to whom goods had been consigned generally for sale, and who had subsequently made advances to his principal on the credit of the goods, was held to have no right to sell contrary to the orders of his principal, on the latter neglecting, on request, to repay the advances, although such sale would have been a sound exercise of discretion on his part; the Factor's authority to sell not becoming, by reason of the unpaid advances, irrevocable, as an authority coupled with an interest. The advances made by the Re-

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(a) 5 C. B. Rep. pp. 895, 914.

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spondents were not contemporaneous with the receipt of the goods. The question was peculiarly one for a jury, and as upon the trial the Judge was satisfied with the verdict, such verdict ought to have been allowed to stand. The jury were rightly directed as to the law by the learned Judge. The holding by the majority of the Court below that the employment of the Respondents by the Appellant was not an employment as Factors, and that the advances made by them were made as Factors, was contrary to the evidence as well as the legal inference from the facts of the case. It was clear that the Respondents were employed as Factors only, and though as it is in the course of business for a Factor to be entitled to claim for warehouse rent, freight, &c., yet it has always been held by the courts that a Factor has no power in law to disobey his principal in selling goods. Moreover, the jury found that there was no usage or implied proof that any such power of sale as claimed was given to the Respondents which would justify the sale, *Lewis v. Marshall* (a),—*Kirchner v. Venus* (b).

Mr. *Lush*, Q.C., and Mr. *Watkin Williams*, for the Respondents.

First, the Respondents had a right to sell the sugars upon the refusal of the Appellant to repay the advances, and the Judge at the trial ought to have so ruled as a matter of law, and not left the question as one for the jury. We do not impeach the authority of *Smart v. Sandars* (c) but the facts of this case are essentially different. Here the goods were placed in the

(a) 7 Man. & Gr. 729.

(b) 12 Moore's P. C. Cases 361.

(c) 5 C. B. Rep. 895.

hands of the Respondents as consignees for the express purpose of obtaining advances. The Appellant himself, in his letter of the 3rd of *May*, 1862, acknowledges that there was to be a power of sale. He says, "I leave to yours to realize the sale of the article in the manner and opportunity that yours to think the best," and this authority he confirms by the letter of the 10th of *July*, 1862. The verdict on this point was certainly against the weight of evidence. The Appellant was an entire stranger to the Respondents, with whom they had nothing to do but as regarded the sugars. It is as if they had become assignees of the hypothecation Bond; when they clearly would have had a power of sale, as they had paid off the Bond and the freight. In *Martin v. Reid* (a) a pawnee of a chattel was held to have a right to sell it, although no special day was named for the performance of the obligation for which the pawn was security, or after which it was agreed that the property of the pawnee should be absolute. Again, in *Pigot v. Cubley* (b) a power of sale was implied from the nature of the transaction. *Kent's Comms.* p. 757-9.

Secondly, the damages were excessive. The measure of damages was founded on an erroneous principle; the Respondents were certainly entitled to be credited with the amount of their unpaid advances. Even if the trover count could be supported, the damages were excessive. *Johnson v. Stear* (c) is an authority that in trover the damages are not necessarily to be measured by the value of the thing converted. [Sir *Edward V. Williams* :—

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(a) 11 C. B. Rep. N. S. 730. (b) 15 C. B. Rep. N. S. 701.

(c) 15 C. B. Rep. N. S. 330.

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That was the case of a pledge, whereas the present case is that of a party having a lien and abusing it by wrongfully parting with the goods. The authorities ending with *Liebel v. Springfield* (a) are uniform, that in such a case the measure of damages is the value of the goods.] In *Dufresne v. Hutchinson* (b) it was held that if a Broker, being authorized to sell goods for a certain price, sells them at an inferior price, he is not liable in trover for the amount of the goods.

29th March,  
 1865.

Their Lordships' judgment was pronounced by

Sir EDWARD V. WILLIAMS.

The appeal in this case was against a rule for a new trial, made absolute by the Supreme Court of *New South Wales*.

The learned Judge before whom the cause was tried laid down to the jury, as matter of law, that by the mere relationship of Factor, the Factor did not, by making advances either at the time or subsequently, acquire any right, in derogation of the rights of the principal, to give directions as to the time and manner of sale, and any such right on the part of the Factor must be made out by an agreement which might be inferred from the evidence, or might exist impliedly by the proof of usage. The jury found that there was no such agreement or usage; that there was unreasonable delay in the sale; that it was not in the exercise of a sound discretion; that the value of the sugar was £24 a ton; and the verdict was thereupon entered at the suggestion of the Judge on the trover count for the value of the sugar, as found by the jury, with nominal damages on the others.

(a) 9 L. T. N. S. C. B. 325.

(b) 3 Taunt. 117.

The majority of the Court below seem to have founded their decision on a supposed misdirection of the Judge in not telling the jury that on the undisputed evidence they ought to find for the Defendants, inasmuch as they were shown by the letter of the 3rd of *May*, 1862, or by that letter in conjunction with the previous conversations and circumstances, to have had conferred on them an irrevocable authority to sell the sugars (or such portion of them as should be necessary) in order to repay themselves the amount of their advances, so as to constitute them special agents for a valuable consideration with that power, and not merely factors. If this did not amount to a misdirection, the majority of the Judges below appear to have thought that at all events there should be a new trial, because the verdict was against the weight of evidence, especially in finding, as it did in effect, that there was no agreement or understanding that the authority to sell should be irrevocable.

Their Lordships are of opinion that there was no misdirection ; for that the decision in *Smart v. Sandars* (5 C. B. Rep. 895), and the principle on which that decision was founded, justify the mode in which the case was left to the jury. It appears to their Lordships that mere advances made by a Factor, whether at the time of his employment as such or subsequently, cannot, according to the doctrine of that case, have the effect of altering the revocable nature of the authority to sell, unless such advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable. It, therefore, became necessary to inquire, on the trial of the present case, whether any such agreement was shown to have been made, or might properly be in-

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ferred from the circumstances. And this, in the opinion of their Lordships, was rightly left as a question for the consideration of the jury. The undisputed facts did not necessarily lead to any such conclusion. The jury had to consider, as a question of fact, whether the advances were made under such circumstances as might justly lead their minds to infer that they were made on the footing of an agreement that Defendants should have an irrevocable authority to sell, in case the Plaintiff made default. The jury thought proper to answer this question in the negative. But they were wrong in so doing, according to the opinion of the majority of the Judges in the Court below. Their Lordships have fully considered the ground expressed by those Judges for their opinion, and also the reasons given by the dissentient Judge for thinking that the verdict ought to stand. Looking at all the circumstances attending the advances (which their Lordships agree with the Court below in regarding as all placed on the same footing), and the conversations and letters which preceded and followed them, their Lordships cannot say the Court below was wrong in considering the weight of evidence in favour of the Defendants to have been so great, as to make it improper that the verdict should stand without a further investigation before another jury.

Their Lordships will, therefore, humbly report as their opinion to Her Majesty that the judgment below should be affirmed, but without costs.

ON APPEAL FROM THE VICE-ADMIRALTY  
COURT OF ANTIGUA.

NICOLAS DIONISSIS - - - *Appellant* ;

AND

THE QUEEN, FRANCIS HART DYKE,  
Her Majesty's Procurator, and  
HENRY SCHANK HILLYAR, the  
Commander of Her Majesty's  
ship "*Cadmus*" - - - } *Respondents.\**

THE "*LAURA*."

THE appeal in this case was brought from a decree of the Vice-Admiralty Court of *Antigua*, by which decree the Brig "*Laura*" and her cargo were condemned as forfeited for breach of the Statutes for the suppression of the Slave Trade.

The "*Laura*," formerly called the "*Ida Raynes*," of *New Orleans*, in the *United States*, was an American

\* Present: The Right Hon. Dr. Lushington, the Lord Justice Knight Bruce, and the Lord Justice Turner.

23rd, 24th,  
25th, & 26th  
Jan. ; & 15th  
Mar. 1865.

The Appellant, a native of the *Ionian Islands*, purchased an American ship, and, upon a declaration that he was a

British subject, obtained from the British Consul at *Cuba* a provisional Registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the Court below, on the ground of the national character of the owner of the ship and cargo, Held :—

First, that the Registry, Flag, and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently that the Registry of the ship was void ; and

Secondly, that even if he could have established that the Registry was void and the ship not entitled to claim the protection of any Flag or nation, yet that the ship was by the Statute, 2nd & 3rd *Vict.* c. 73, liable to be adjudicated upon by a Vice-Admiralty Court for a violation of the Slave Trade Acts.

A decree of the Vice-Admiralty Court at *Antigua*, condemning a ship



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built vessel of 303 tons burthen. The vessel was transferred at *Havannah* by Bill of sale in *October*, 1861, to the Appellant, who obtained a provisional certificate of registry from Her Majesty's Consul-General in *Cuba*, dated the 25th of *October*, 1861, on his declaration, in which he was described as of the *Ionian Islands*, Master Mariner, and by which he declared that he was a British subject, born at *Cerigo*, and had never taken the oath of allegiance to any Foreign State.

After the decree of condemnation, and while the cargo was being unloaded, it was discovered by one *Dickinson*, a Master shipwright, acting under the directions of the Marshal of the Court, that the vessel had been altered from her original build, the pieces of the deck plank having been cut away to make a booby hatch, and the carlines and half-beams cut away for the same purpose, and also a circular piece of wood cut out of the hole which admits the ventilation in the hold. *Dickinson* made an affidavit of these facts which were transmitted with the record.

An allegation pleading these facts was brought in the appellate Court by the Respondents. The admission of

and cargo for infraction of the Slave Trade Acts, reversed, and restitution decreed, with damages and costs.

As proceedings under the laws for the suppression of the Slave Trade are penal, the offence charged being a criminal offence, the *onus probandi* is upon the Seizors to establish that the law has been infringed.

Offences against the Slave Trade Acts may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded.

Where articles of merchandize usually employed for the purpose of the Slave Trade, but capable of being employed for lawful commerce are found on board a vessel seized on suspicion of being so employed; it is not sufficient to consider merely of what the cargo of the vessel accused of, being implicated in the unlawful trade, consists, but all the circumstances of the case, and more especially the locality in which the vessel may be found, must be taken into consideration.

An allegation pleading facts, *noviter ad notitiam perventa*, admitted by the appellate Court, and evidence taken *vivâ voce* thereon.

this allegation was opposed by the Appellant, but their Lordships \* admitted the same, being of opinion, that the facts alleged were strictly within the rule of *noviter ad notitiam perventa*, having been discovered subsequent to the date of the decree of condemnation, (a) and gave permission for oral evidence to be taken at the hearing of the appeal. A counter allegation by the Appellant, denying generally the statements in the Respondents' allegation, was admitted, without opposition. Evidence was taken *viva voce*, *Dickinson* being examined before their Lordships, upon the new matter pleaded in the Respondents' allegation.

The facts relating to the seizure and effect of the evidence in the Court below and upon appeal sufficiently appears from the judgment of their Lordships.

The appeal was argued by

Dr. Deane, Q.C., and Mr. V. Lushington, for the Appellant, and

The Queen's Advocate (Sir R. Phillimore, Q.C.), and Dr. Swabey, for the Respondents.

A preliminary question was raised by the Appellant as to the national character of himself and ship. It was contended, that he was an Ionian by birth, and had never resided in *Great Britain*; and that, as the ship and cargo were owned solely by him, the Vice-Admiralty Court at *Antigua* had no jurisdiction; the "*Walsingham Packet*" (b); and it was insisted, that the

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\* Present: 23rd June, 1864, Lord Cranworth, Sir Edward Ryan, and Sir John Taylor Coleridge.

(a) As to the practice of the appellate Court admitting a further allegation pleading facts, *noviter ad notitiam perventa*, see *Jones v. Godrich*, 5 Moore's P. C. Cases, 16. The "Newport,"

11 Moore's P. C. Cases, 155.

(b) 2 Rob. 83, 4.

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Slave Trade Act, 5th *Geo.* IV. c. 113 (a), applied only to British subjects ; and that being an Ionian and not British subject (b), the registry granted to him by the British Consul at *Cuba* under sec. 64 of the Merchant Shipping Act, 17th & 18th *Vict.* c. 104, was wholly void.

On the part of the Respondents, it was submitted that the "*Laura*" was under a British Flag; and as she was registered by the Appellant as a British ship, he was estopped from showing that she was a Foreign ship owned by a Foreigner.

The Right Hon. Dr. LUSHINGTON :

A preliminary objection has been taken by the Counsel for the Appellant. They contend that the Vice-Admiralty Court at *Antigua* had no jurisdiction to try the question which it had decided.

The case may be reduced into the shortest possible compass. The "*Laura*" originally belonged to *New Orleans*. She was sent on a voyage to *Cuba*, and while there at *Havannah* was sold to the present Appellant. He, it appears, was anxious to obliterate all traces of the nationality of the vessel which he had purchased. Being a native of *Cerigo*, one of the *Ionian* Islands, the best course seemed to him to be to apply to the British Consul for the purpose of obtaining a British register. Mr. *Crawford*, Her Majesty's Consul-General at *Cuba*, refused at first to comply with his request, and there is some doubt as to the precise grounds of his refusal.

(a) The provisions of this Statute are extended by the 11th *Geo.* IV. & 1st *Will.* IV. c. 55, 1st & 2nd *Vict.* c. 47, and 2nd & 3rd *Vict.* c. 73 ; 3rd & 4th *Vict.* c. 64.

(b) As to the national character of the *Ionian* Islands, see The "*Ionian Ships*," 1 *Spinks' Prize Cases*, 193 ; The "*Leucade*," 1 *Jur. N. S.* 549 ; The "*San Spiridione*," 2 *Jur. N. S.* 1238 ; and the 20th *Vict.* c. 4.

It is, however, quite clear that the Appellant did eventually receive from him a provisional register. Now, it appears to their Lordships that, in the giving of this register, and in the receipt of it by the Appellant, there is no reason to suspect fraud on either side. It was necessity alone which induced the Appellant to make his application for the registry.

The question, then, remains, what is the effect of this register? It was contended by the Appellant that it was wholly void, and that, therefore, the Court below had no jurisdiction. But the operation of such a register may be very different under different circumstances. It may be that in a Civil Court this vessel would not be entitled to the privileges or advantages usually enjoyed by British ships. But it is a very different question whether she can escape all the consequences which follow upon the adoption of the Flag under which she sailed. We apprehend that it is a proposition which has never been disputed, that the register, Flag and pass of a ship carry with them a presumption of national character that they are true and correct; and that the owner is not at liberty to aver against them. We should, therefore, upon this general principle, hold that the argument of the Appellant is not well founded. But even assuming such an argument to be well founded, and that the register was a nullity, and nothing but waste paper, the vessel would not appear to be justly entitled to claim the protection of any Flag or nation; since, by the Statute, 2nd & 3rd *Vict.* c. 73, s. 1, power is given to the Courts of Admiralty to adjudicate upon such vessels when captured by British cruisers. Their Lordships are, therefore, of opinion that this objection to the jurisdiction cannot be supported.

The appeal was then heard upon the merits. The

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arguments consisted of a minute and elaborate examination of the evidence respecting the cargo and character of the vessel. The "*Newport*" (a) was cited.

Their Lordships' judgment was reserved, and now<sup>2</sup> delivered by

The Lord Justice TURNER.

This is an appeal by the owner of the brig "*Laura*," and of her cargo, from a decree of the Vice-Admiralty Court at *Antigua*, bearing date the 7th of *July*, 1862, condemning the brig and her cargo as forfeited for breach of the laws for the suppression of the Slave Trade. This vessel, which was built in the Southern States of *North America*, was purchased by the Appellant at *Havannah* in the month of *October*, 1861. She took on board some cargo at *Havannah*, and sailed from that port for the Island of *St. Thomas* on the 30th of *November*, 1861. She reached *St. Thomas* on the 1st of *January*, 1862, took on board some further cargo there, and sailed from that island for the Island of *St. Bartholomew's* on the 20th of *January*, 1862. On that same 20th of *January*, 1862, she was captured by Her Majesty's ship "*Cadmus*," and carried to the Island of *Antigua*, where she was condemned as above mentioned.

We shall presently enter into the details of this case, so far as in our judgment they are material to be considered; but, before doing so, it may be well to notice some points which are common to all cases of this description, and some considerations which apply only to this particular case.

To be in any way concerned in the Slave Trade is a highly criminal offence, and the laws for the suppression of the trade are of a very penal character,

(a) 11 Moore's P. C. Cases, 155.

affecting both the persons and the property of those who venture to embark in so nefarious a traffic. The proof of the infringement of these laws must, therefore, rest upon those who allege that they have been infringed. This is the rule of law which applies universally to cases of criminal offences, and there is no exception to this rule in cases of offences against the laws for the suppression of the Slave Trade. Offences against these laws may no doubt be established, as offences against other laws may be established, by circumstantial evidence; but the circumstances brought forward to establish the offence must be such as do not end in suspicion merely. They must be such as to satisfy a reasonable mind that the suspicion is well founded, and that the offence has been committed. Again, it must be observed that most, if not all, of the articles of merchandize which are employed for the purposes of the Slave Trade are also capable of being employed for the purposes of lawful commerce; and that in these cases, therefore, it is not sufficient to consider merely what are the cargoes of the vessels accused of being implicated in the unlawful trade, but all the circumstances of each particular case, and more especially the locality in which the vessels may be found, must be taken into consideration.

It is obvious that vessels laden with cargoes capable of being employed either in the unlawful trade or in lawful trade, cannot, when found at a distance from the coast of *Africa*, where the cargoes, if intended for the unlawful trade, would come into use, be looked upon with the same degree of suspicion as they would justly be subject to if found in immediate proximity to that coast. These are considerations which apply generally to all cases of this description.

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As to this particular case, in addition to the details to which we shall presently refer, it is to be observed that before this decree was pronounced the case had been investigated, both in the Police Court at *St. Thomas*, and in the Criminal Court at *Antigua*, where the Appellant and some of the crew of the vessel were indicted for felony under the Statutes on which this case proceeds, and that nothing unfavourable to the Appellant's case appears to have been elicited upon the investigation in the Police Court; and upon the trial in the Criminal Court the Appellant and the crew were acquitted.

With these preliminary remarks we proceed to consider the details of the case. It will be convenient to consider them under three heads. First: such of them as relate to what passed at *Havannah*. Secondly: such of them as relate to what passed at *St. Thomas*. And thirdly: such of them as relate more particularly to the special grounds on which the Respondent's case is rested, so far as we think it necessary to enter into those grounds.

First, then, as to the details of what passed at *Havannah*. The case, as we collect it from the evidence, stands thus: the Appellant, who is an Ionian by birth, and has been a sailor from a very early period of his life, had for about eighteen years before the year 1861 sailed and traded between *North America* and the Islands in the *West Indies* and the coasts of *Mexico*, the *Caribbean Sea* and *Central America*, as far as *Rio Janeiro*, and in the course of these years he had made frequent voyages between *New Orleans* and *Cuba*, his family for the last few of these years residing at *New Orleans*. In the latter end of *August* or beginning of *September*, 1861, he came from *Mexico* to *Havannah*, and on his arrival at

*Havannah* found several vessels lying there unemployed and for sale, in consequence, as it would appear, of the war then raging between the Northern and Southern States of *North America*. He was desirous of purchasing one of these vessels, and after examining several of them determined to purchase the vessel which is the subject of this appeal, and is now called the "*Laura*," but was then called the "*Ida Raynes*." He negotiated for this purchase with a person named *Pertusio*, who was the agent for the sale of the vessels, and is alleged on the part of the Respondents to have been extensively engaged in the Slave Trade; ultimately he agreed with *Pertusio* to purchase the vessel for 5,500 dollars. On the 17th of *October*, 1861, he paid to *Pertusio* 4,500 dollars on account of the purchase-money, and he afterwards paid the balance of the purchase-money. On the 24th of *October*, 1861, the vessel was assigned to him by a Bill of sale of that date. Pending the negotiation for this purchase, he was desirous of obtaining for the vessel a British certificate of registry, for the purpose, as it would seem, of securing to himself the benefit of a neutral Flag, and he accordingly applied to Mr. *Crawford*, the British Consul in *Cuba*, for this certificate. Mr. *Crawford*, after some demur, on the 25th of *October*, 1861, granted him a provisional certificate for the vessel, to continue in force until the 25th of *April*, 1862, or until the arrival of the vessel at some port where there was a British Registrar, whichever should first happen; and in the declaration of ownership appended to this certificate, the Appellant declared that he was a British subject born at *Cerigo*, and that he had never taken the oath of allegiance to any Foreign State. Having completed the purchase of the vessel, he proceeded to

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ing of 416 pipes rum, 11 boxes sugar, 150 lbs. coffee, and 9,000 cigars, and that owing to the peculiar nature of her cargo, and other circumstances connected with the vessel, my suspicions have been aroused as to the ultimate destination of the '*Laura*,' and I obliged the Master and owner, *Dionissis*, to give bond for 25,000 dollars that his vessel shall not be employed in the African Slave Trade.

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"I have been assured that the '*Laura*' will proceed direct to your port, in the first instance, and I presume that *Dionissis* will sell or make the vessel over there to other parties, and will then apply to you for a certificate that he has ceased to be owner, so as to cancel therewith the Bond granted at this place.

"The '*Laura*' was formerly the American brig '*Ida Raynes*,' and was sold here to *Dionissis*, who, being an Ionian, applied for and obtained a provisional certificate of British registry.

"You are no doubt aware that it is impossible to obtain legal proofs of anything connected with slave-trading operations at this place, and that the vessel having been duly cleared at the Custom-house, there was no reason for detaining her here; but as I feel confident that the '*Laura's*' ultimate destination is the coast of *Africa*, you will see the necessity there is for watching her at *St. Thomas*, and of preventing her sailing under British colours without satisfactory Bond being given that no illegal voyage is intended.

"I shall send a description of this vessel to Her Majesty's Government, to serve, in case she is fallen in with by any of our cruisers.

"*Jos. T. Crawford*,  
"Consul-General in *Cuba*."



the '*Laura*' to the coast of *Africa* to engage in the Slave Trade, the vessel would be transferred at *San Thomas* or elsewhere, and that a person who was to be the master accompanied said *Dionissis* from hence, and would take the command upon the '*Laura's*' being so transferred.

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"2. I enclose to you a certificate of the cargo which was cleared at this Custom-house on board the '*Laura*,' under the seal and official signature of the proper officer duly certified by me.

"3. I also transmit you a certified copy of the declaration of ownership by *Nicolas Dionissis*, wherein he states that he is a subject of Her Majesty, born at *Cerigo*, in the *Ionian* Islands, and that he has never taken the oath of allegiance to any Foreign State.

"There is no doubt in my mind as to the destination and ulterior employment of the brig '*Laura*.'

"I wrote to Mr. Consul *Lamb*, of *St. Thomas*, to watch her, and it appears, by what has become known, that the '*Laura*' took on board at that place a large quantity of provisions, and the materials for erecting a slave-deck; and it is certainly very unaccountable that with such a lading, she should have been proceeding to *San Bartholomew's*.

"Doubtless Captain *Hillyar* had the '*Laura*' carefully searched before capturing her and taking her into *Antigua*.

"I would suggest that the casks cleared here as being filled with rum, be thoroughly examined; it may be that they are not filled with rum, but are, in truth, casks and barrels of water—a dodge not unfrequently resorted to by slavers to facilitate the shipment of a sufficiency of water, because, as there

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is no export duty on rum, there is no inspection of the contents of casks at the time of shipment.

"If it results that many of the casks or barrels on board the '*Laura*' are full of water, condemnation must follow under the provisions of the Treaty with *Spain* for suppression of the Slave Trade, 1835. See Instructions to Naval Officers, 12th *June*, 1844, p. 343.

"*Jos. T. Crawford*,  
 "Consul-General in *Cuba*."

It does not very clearly appear whether this letter, although printed in the Appendix, was actually received in evidence in the Court at *Antigua*, but we may conveniently refer to it, as upon the cross-examination of the Appellant questions were put to him as to the several grounds of suspicion stated in this letter. These questions, and the answers given to them by the Appellant, were as follows :—

"Question. Did not Mr. *Crawford* state to you that one of the reasons for exacting the bond was the unusual cargo laden on board the '*Laura*' to be carried to an island in the *West Indies*, and the cargo being precisely such as is usually laden by vessels proceeding to the coast of *Africa* to be engaged in the Slave Trade?

"Answer. He did not express himself in such words. When I asked him why he should require a bond from me, he told me that the peculiarity of the cargo which he heard was put on board, and some other rumours, obliged or determined him to charge me with such a heavy bond. The word used was determined. He never said anything to me that I recollect about taking such a cargo to the *West*

*Indies.* He said on account of the cargo and some rumours he thought I was going to the coast of *Africa*. I told him that I was not going to the coast of *Africa*—never had such an idea.

“Question. Did not Mr. *Crawford* state that another of his reasons for exacting the bond was from your antecedents, as having been engaged in the Slave Trade, and from your having been on board the celebrated slaver ‘*Wanderer*,’ of which you were said to have been the master when that vessel went to the coast of *Africa* from the port of *Havannah*?

“Answer. If Mr. *Crawford* said that to me at *Havanna*, I would make him pay pretty dearly for it, or else he had to prove it. But he told me another reason, besides the one I mentioned before, that he, Mr. *Crawford*, did not believe that I was going in the brig ‘*Laura*’ no further than the *Salt-Key Banks*, which is at the entrance at the Gulf of *Florida* and the *Bahama* Old Channel; and that he thought that I should give up the vessel at *Salt-Key Bank* to somebody else, and return back to *Havannah* in a few days. Mr. *Crawford* did not state anything about being engaged in the Slave Trade, and never mentioned the ‘*Wanderer*’ to me. I do not know anything about the slaver ‘*Wanderer*.’ I knew a yacht ‘*Wanderer*,’ belonging to *New Orleans*, owned by Commodore *Johnson*—a rich planter called Commodore *Johnson*. I saw her several times at *New Orleans*, and I have seen her at *New York*. I never saw her at *Havannah*, but I heard she was at *Havannah*, and lately I heard she was taken by the Northern cruisers on account of her being a Southern vessel, and turned into a Northern man-of-war or gunboat. I have been on board of her at *New Orleans*, when she first arrived

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there. Commodore *Johnson* gave a ball on board some long time ago ; I don't recollect the time ; some four or five years ago. I was invited among the guests, and there were from 150 to 200 persons on board ; it was a dinner and ball. I never was master of the '*Wanderer*;' never sailed on board any vessel of that name.

"Question. Did not Mr. *Crawford* state that another of his reasons for demanding the bond was your connection and intimacy with *Pertusio*, who was known at *Havannah* as a notorious agent and outfitter of slavers at *Havannah* ?

"Answer. I never understood him to say so ; when I brought the two first securities to him, he said, after refusing them, 'It is strange that Mr. *Pertusio* cannot procure a good security : he knows almost everybody in this place.' That's all I recollect he said about Mr. *Pertusio*."

We pause here to consider the effect of the evidence as to this part of the case. We find nothing in the evidence to contradict the statements made by the Appellant upon his cross-examination. There is no evidence whatever that the Appellant had ever been engaged in the Slave Trade, or had ever had anything to do with the slaver "*Wanderer*," or any other slaver, or even that *Pertusio* had been in any way concerned in the trade ; and, certainly, there is nothing to show that if *Pertusio* had been so concerned the Appellant was aware of it. There is nothing, so far as we can find, to lead to suspicion in the antecedents either of the Appellant or of the vessel. The crew of the vessel appears to have been engaged, and the ship's articles signed, according to the ordinary course of such business. It was sug-

gested, on the part of the Respondents, that the Appellant was not, in fact, the real purchaser of this vessel, but we see nothing in the evidence to support this suggestion. The Respondents relied much upon the false statement by the Appellant in the certificate of registry that he was a British subject; but surely the British Consul was much more competent to judge of the question of the Appellant's nationality than the Appellant himself could be, and the British Consul, after consideration, granted the certificate. The Respondents also relied greatly on the character of the cargo shipped at *Havannah* as being unfit for sale at *St. Bartholomew's*, or any other of the *West India* Islands. We shall presently have occasion to refer more fully to this subject, but at present it is sufficient to state, that although, no doubt, a further voyage was intended in case the cargo of the vessel could not be sold in the *West India* Islands, the character of the cargo does not seem to us to furnish any just inference that in the event supposed the vessel was intended to go to the Coast of *Africa* rather than to break the blockade, to which the Southern States of *North America* were then subject, by proceeding to *St. Helena* Sound, or some other of those ports, a destination which is suggested by the evidence. If, therefore, the case had rested here, we cannot doubt that our decision upon it must been in favour of the Appellant.

We proceed, then, to consider the second head, the details of what passed at *St. Thomas*. What occurred at this place appears, by the evidence, to have been, that a large quantity of additional cargo was taken on board, consisting, for the most part, of provisions of different descriptions; but in part, also, of a great

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variety of miscellaneous articles, amongst others, of earthenware, paints, paper, some demijohns, corks, 1,000 fire-bricks, 70 boards (2,098 feet), 299 white pine boards, and 50 scantlings (1,276 feet); some iron was also taken on board at this place from a vessel called the "*Globe*," which was lying in the port. A carpenter from the "*Globe*" was also for several days employed on board the vessel; and immediately before the vessel sailed from *St. Thomas* for *St. Bartholomew's*, two persons not on the list of the crew, were taken on board, and they sailed with the vessel for *St. Bartholomew's*.

Now the character of the cargo taken on board at *St. Thomas* certainly does not, of itself, cast any suspicion upon the purpose for which the vessel was intended to be employed; on the contrary, it rather tends, as it seems to us, to remove any suspicion which might have attached to the vessel in consequence of the cargo shipped at *Havannah*. It is only in connection with other circumstances to which we shall presently refer that the cargo shipped at *St. Thomas* can, in our opinion, have any bearing upon the case. We, therefore, postpone, for the present, any further observations upon it. We postpone, also, any observations upon the employment of the carpenter on board the vessel during her stay at *St. Thomas*, as this fact seems to us to bear only upon the alterations in the vessel which we shall also presently notice.

We may, however, now conveniently dispose of that part of the case which relates to the two persons taken on board at *St. Thomas*. Both these persons have been examined; and as to one of them, *Castell*, we are satisfied, both from his evidence and from the

other evidence in the cause, that he was taken on board only for the purpose of piloting the vessel into *St. Bartholomew's*. As to the other of these persons, *Bauen*, we are not so well satisfied with his evidence, nor do we consider it to be clearly established that he was, as the Appellant has stated, taken on board as a passenger merely ; but, on the other hand, his evidence is to a great extent uncontradicted, and the testimony of one, at least, of the witnesses who impeach it (we refer to the witness *Jones*) is, to say the least, worthy of no credit ; and we may add that there are details to be found in his evidence which, if untrue, might well have been contradicted. We do not think, therefore, that his evidence, although not to be completely relied on, can be wholly disregarded ; but assuming that it could, and that he was taken on board as carpenter, and not as passenger, and even assuming, as suggested in the argument on the part of the Respondents, that he was the carpenter who in the first instance came on board the vessel from the "*Globe*," it does not seem to us that these considerations would materially affect the case. It would, we think, be going much too far to infer that the vessel was intended to be employed in the Slave Trade, from the fact of a carpenter having been taken on board her, even coupling that fact with the cargo found on board. The case, therefore, as it stood at *St. Thomas*, does not, thus far at least, seem to us to be more favourable to the Respondents than as it stood at *Havannah*. As to what passed between the time of the vessel leaving *St. Thomas* and the time of the capture, we do not think there is anything material to be observed upon. The Respondents, indeed, attempted to raise some suspicion, upon the ground

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of the vessel having changed her course when pursued by the "*Cadmus*," but this suggestion seems to us to be quite unworthy of notice. Much more might have been said if she had not changed her course, as her original course might, it appears, have taken her out of the reach of capture. We proceed, then, to consider the special grounds on which the Respondents' case is rested, so far as we deem it necessary to enter into them. The Respondents, first, rely upon the construction and fittings of the vessel. The principal points on which they rest their case in this respect are, that in this vessel there are three hatches,—the fore hatch, the main hatch, and a third hatch aft the main hatch, which, in these proceedings, and in the course of the argument before us, has been called the booby hatch; being, as we understand, a hatch or opening in the deck having a cover over it. That, besides these hatches, this vessel has two scuttles, and that there are stringers or beams running fore and aft along the whole length of the sides of the vessel, at the distance of about six feet below the vessel's deck. They say that in ordinary merchant-vessels there are not more than two hatches, the fore hatch and the main hatch, and there are no stringers: that the booby hatch and one, at least, of the scuttles were not in the vessel when she was built, but have been cut out of the deck since the vessel was built, and since she was purchased by the Appellant; and that the booby hatch is not constructed as ordinary hatches are, and was not made, and is not adapted for cargo purposes; and amongst other circumstances tending to cast a suspicion on this booby hatch, they point to its cover having been made capable of being opened or shut by means of slides. They insist that

the booby hatch and its cover, and the scuttles, have been put into the vessel for the purpose of affording better ventilation for slaves to be lodged in her hull; and that the stringers have been introduced for the purpose of supporting a slave deck intended to be laid on scantlings placed across the vessel, and resting on these stringers. The Appellant, on the other hand, insists that the three hatches, the scuttles, and the stringers are commonly to be found in merchant-vessels built in *America*, and that the booby hatch was in the vessel when he purchased it, and was made and is adapted for cargo purposes. There is a vast mass of evidence bearing more or less directly upon all these points, but without entering into the details of this evidence, it will be sufficient for us to state what, in our opinion, is the result of it.

We are of opinion that the evidence establishes, beyond all doubt, that the three hatches and the scuttles are commonly to be found in American-built merchant-vessels, and that the booby hatch was capable of being used for cargo purposes. It appears, indeed, that it has in fact been so used by the crew of the "*Cadmus*" in loading or unloading the vessel at *Antigua*; but we think that the evidence does not satisfactorily prove that this booby hatch was made before the Appellant purchased the vessel, or that it is constructed as hatches are usually constructed.

The balance of the evidence on these points seems to us to be in favour of the Respondents; but assuming it to be so, and even assuming, further, that this hatch was constructed as it is for the purpose of better ventilation, we do not think that these circumstances materially affect the question we have here to decide, for we think that the evidence clearly proves

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that in merchant-vessels employed in the ordinary course of trade, and more particularly in such vessels when employed in conveying sugar, which would certainly not be an unusual cargo for vessels trading in the *West Indies*, it is of great importance that the holds of the vessels containing the cargo should be effectually ventilated, and we do not think that the adoption of a mode of ventilation different from that which is ordinarily used would justify the presumption that the purpose of the ventilation was different from its ordinary purpose.

The other points as to the construction and fittings of the vessel, on which the Respondents relied, are of so trifling a nature that we do not think it necessary to observe upon them.

Another point on which the Respondents rested their case was the character of the cargo of this vessel. The articles of the cargo mainly relied upon on the part of the Respondents, as affording evidence that this vessel was intended to be employed in the Slave Trade, were the scantling and the white pine boards, the fire-bricks, and the iron. The scantling and the white pine boards must, it was said, have been intended for laying a slave-deck, suspended on the stringers, at the distance of six feet below the vessel's deck, and the fire-bricks and iron for constructing an additional stove to cook for the slaves.

These suggestions appear to us to savour much more of ingenious conjecture than of just inference. They are, we think, displaced by the evidence in the cause.

As to the scantlings and white pine boards, the evidence satisfies us that the scantlings were not ordered to measurement, and were not measured. They were

shipped as they had been cut from the forest. There is, besides, abundant evidence that lumber of this description is an ordinary article of trade in the *West India* Islands; and as to the fire-bricks and iron, independently of the evidence as to the iron having been procured for the purpose of ballasting boats, it cannot surely be supposed that 1,000 fire-bricks could have been purchased for the purpose of constructing a stove. We may add, as to the Respondents' case upon the cargo, that *Spurrell*, one of their witnesses, enumerates the articles of which the cargoes of vessels employed in the Slave Trade are generally composed, and that in his enumeration there are contained a variety of articles, none of which were found in the cargo of this vessel. A further point on which the Respondents rested was the appliances for water contained in the vessel, and the quantity of water which was found in her; but as to the tanks, the principal part of these appliances, it is not even suggested that they were introduced into the vessel after the Appellant purchased her, and as the vessel does not appear to have been employed in the Slave Trade before she was purchased by the Appellant, the fact of these tanks being found in her can afford no evidence that she was intended to be employed in that trade; and as to the quantity of water found in the vessel, the evidence, although it shows that the quantity was large, does not in our opinion justly lead to the conclusion that the vessel was destined for the coast of *Africa* rather than for any other lengthened voyage, to which the difficulty of selling the cargo at the Island of *St. Bartholomew* might lead. The Respondents also rested much upon this, that there were found on board this vessel a variety of charts,

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and amongst others, several charts of the Island of *Cuba*, and one of the coast of *Africa*, with tracks delineated upon it. This was certainly a matter requiring explanation, and the evidence, as we think, affords a reasonable explanation of it. Charts would of course be required for navigating the vessel, and there is no trace of there having been any on board the vessel when she was purchased by the Appellant.

The circumstances under which these charts were procured are stated by the Appellant to have been, that he could not procure on shore at *Havannah* charts by which the vessel could be worked, and he therefore desired the mate to procure them from the shipping in the port, and the mate, *O'Sullivan*, confirms this statement, and adds, that he procured the charts from the shipping, mentioning the persons from whom he procured them.

There is no contradiction to this evidence. The Appellant, indeed, does not appear to have been asked a question on the subject, and the cross-examination of the mate upon it tends to confirm his evidence in chief. If the charts could have been procured on shore at *Havannah*, the Respondents could have proved that fact. They have given no such proof. There was evidently no concealment of these charts. They were lying in the cabin in rolls during the time the vessel was under seizure. There is, besides, abundant evidence to show that vessels commonly carry charts of seas in which they have never been, and to which they have no intention of going. *Spurrell*, the Respondent's witness, states that he has charts of the coast of *Africa* on board his ship, and several other masters of ships state also that they have such charts on board their ships. Looking, then, to the special

grounds on which the Respondents' case is rested, we have come to the conclusion that the evidence adduced by them is insufficient to support those grounds; but then it was strongly urged on their part that their evidence was, at least, sufficient wholly to discredit the case set up by the Appellant; and, possibly, if the Appellant's case had rested on his own testimony only, we might have adopted this view; but the Appellant's case is so strongly confirmed, at least as to many of the material points, by other and independent testimony, which the Respondents have failed to displace, that we cannot see our way to yield to this argument on their part. We observe that the learned Judge, from whose decree this appeal is brought, has in his very able and elaborate judgment (for, although we differ from the learned Judge in his conclusions, his judgment is fully entitled to be characterized as both able and elaborate) adverted to there being some difficulty in decreeing restitution of this vessel to the Appellant, on the ground that he has stated by his claim that he is not, and never was, a British subject, and that he can therefore have no title to a British ship; but, as the learned Judge has himself observed, the record does not properly raise this point, and, besides, this vessel, although undoubtedly she was to be considered as a British ship when she was captured, and therefore liable to condemnation if a sufficient case was proved against her, could not, as we apprehend, be considered to be a British ship after the expiration of the provisional certificate of registration, which had expired before this decree was pronounced. Any difficulty, therefore, which there might have been in decreeing restitution would seem to have been at an end, and

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certainly this is not an objection to which we should be inclined to give effect, having regard to the circumstances under which the certificate of registration of this vessel was granted.

There is one other point on which, before parting with this case, we feel bound to observe. Attempts appear to have been made to induce some of the crew of this vessel to make statements favourable to the case of the Respondents. We refer particularly to the evidence of *Rowley*. Such attempts, if they were in fact made, were, in our opinion, unjustifiable ; and if they were not in fact made, it is much to be regretted that no contradiction has been given to the testimony of this witness.

Upon the whole, the true state of this case has appeared to us to be that the British Consul at *Havana*, in the first instance, took up suspicions against this vessel which, so far as appears upon the evidence before us, he had no sufficient grounds for entertaining, and that the vast mass of evidence which we have before us has resulted from an attempt to find grounds for supporting those suspicions—an attempt which has failed ; and we feel ourselves bound, therefore, humbly to recommend Her Majesty to reverse this decree, and to order restitution of this vessel, with damages and costs both in the Court below and of this appeal. Any costs already paid by the Appellant to be refunded.

# CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT  
OF NEW SOUTH WALES.

JAMES GRAHAM AND CHARLES } *Appellants ;*  
BINDON - - - }

AND

ALEXANDER BERRY - - *Respondent.\**

THIS appeal was brought from a judgment of the Supreme Court of *New South Wales*, upon a special case stated by the consent of the parties for the opinion of that Court, in an action wherein the Re-

14th March,  
1865.

The Colo-  
nial Act esta-  
blishing  
Municipal  
institutions  
in *New South  
Wales*, the  
22nd *Vict.*

\* Present: Lord Kingsdown, the Master of the Rolls (Sir John Romilly), and Sir Edward Vaughan Williams.

No. 13, sec. 1,  
declares, that

"any City, Town, or Hamlet now or hereafter established, or any Rural District, may as thereafter provided, be constituted a Municipality." Section 2 provides, that upon petition, and after other proceedings have been taken, as therein described, the Governor may by Proclamation, declare such City, Town or Hamlet, or such Rural District, to be a Municipality. A petition in pursuance of this Act by certain householders residing at four places, therein specified, proposing certain boundaries therein described, having been presented to the Governor, he by a Proclamation, reciting his powers under that Act, and the petition and other proceedings taken in pursuance thereof, declared a Rural District therein

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spondent was Plaintiff and the Appellants were Defendants.

The Plaintiff was a large landed proprietor in the District of *Shoalhaven* in the Colony of *New South Wales*, and the Defendants respectively the Mayor and Bailiff for the Municipality of *Shoalhaven*. The action was in trespass and trover for breaking and entering the Plaintiff's land, and selling his goods under a distress for certain rates alleged to be due from the Plaintiff to the Municipality, and, so far as is relevant to the present appeal, it was to be taken that the action was brought to try the validity of the constitution of the Municipality of *Shoalhaven*, the Plaintiff insisting, that the Municipality was unduly constituted and void. This was denied by the Defendants. Upon the trial it was agreed to state a special case for the opinion of the Court upon the above-mentioned question, as well as others, which were not relevant to this appeal.

The material part of the special case, which related to the point in issue, was, in substance, as follows:—

named to be a Municipality, to be divided into two wards, with certain limits and boundaries as therein defined. This Proclamation described the District incorporated in very different terms from those set out in the petition, for besides incorporating a Rural District with a Town, it included lands which the Petitioners had not asked to be included, and it omitted lands which the Petitioners had prayed to have included. Held, affirming the judgment of the Supreme Court, that this was fatal to the validity of the Proclamation, and that consequently the Municipality in question was not duly constituted or created in point of law.

Where a question arose upon the construction of a Proclamation made under a Colonial Act respecting the formation of a Municipality, affecting the government of the Colony, and the appeal sought only a construction of the Proclamation, leave to appeal was granted, although the time limited for appealing had expired; but as the appeal was only admitted to determine such construction, terms were imposed upon the Petitioners, first, that it was to be without prejudice to a judgment already existing in the Respondent's favour arising out of the same transaction; and secondly, that a security Bond should be executed by the Petitioners to indemnify the Respondent, (in any event in which the appeal was determined,) his expenses and costs of appeal.

After the passing of the *New South Wales Municipalities Act*, 1858, the 22nd *Vict.* No. 13, certain inhabitants, being more than fifty in number, resident householders of the Government Township of *Nowra*, *Nowra Hill*, *Greenhills*, and of *Good Dog*, in the District of *Shoalhaven*, petitioned his Excellency, the then Governor of the Colony, praying that the Governor and Executive Council would take the premises into consideration, and that the Town of *Nowra*, *Nowra Hill*, *Greenhills*, and *Good Dog* might be divided into two wards, and proclaimed, with the boundaries in the petition set forth, a Municipality under the above-mentioned Municipalities Act. The boundaries referred to in the petition were delineated upon a map given in evidence on the trial. The substance and prayer of the petition was, by direction of the Governor and with the advice of the Executive Council, notified and published in the *New South Wales Government Gazette*, on the 17th, 23rd, and 29th of *March*, the 12th and 26th of *April*, the 10th and 24th of *May*, and the 14th of *June*, in the year 1859.

On the 8th of *April*, 1859, the Plaintiff sent a letter or Memorial to the then Governor of the Colony, in reference to the petition and proposed Municipality, and enclosed certain documents therein referred to.

Certain correspondence took place between the Plaintiff, the Colonial Secretary, the Plaintiff's Attorney and the Colonial Secretary, and also between the Plaintiff and the Secretary for Lands and Works, in relation to the petition and the proposed formation of the Municipality, which was referred to and agreed

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to be taken as part of the case, but which it is not necessary to state.

Four counter petitions against the incorporation of the Municipality were forwarded and presented to the Governor of the Colony, notifications of which were published in the Government Gazette.

A Proclamation was made under the hand of the Governor and seal of the Colony, bearing date the 21st of *September*, 1859, in the matter of the petition for the Municipality. The area set forth in the proclamation, and proposed to form the Municipality, was delineated and shown upon a map appended to the special case. The area set forth in the proclamation, and thereby declared to be incorporated, included land which was not included in the petition for incorporation, and omitted lands which were included in the petition.

The lands so included within the proclaimed boundaries, and not mentioned in the petition for incorporation, were at the time inhabited by householders, some, or all of whom, being tenants to the Plaintiff (as well as the Plaintiff himself), had petitioned against the proposed incorporation.

The *Shoalhaven* river, which runs through the Municipality, as shown on the map, was a large navigable river, and the land on the north side thereof was in one County, and that on the south side thereof in another County.

*Nowra* was at the dates of the first mentioned petition and Proclamation, a place proclaimed by the Government as a Town, and was situated entirely on the south side of the *Shoalhaven* river, and was a Town where fermented and

spirituous liquors might be sold ; and a notification by the then Governor appeared in the Gazette on the 8th of *September*, 1857, declaring *Nowra* a Town to come within the meaning of the third clause of the Colonial Act, 13th *Vict.* No. 29, so as to constitute it a place at which fermented or spirituous liquors might be sold in quantities not less than two gallons at one time.

*Nowra Hill* and *Greenhills* were tracts of land on the same side of the *Shoalhaven* river, and in the vicinity of the Town of *Nowra*, but formed no part thereof. *Good Dog* was a tract of land, situate on the opposite side of the *Shoalhaven* river to the Town of *Nowra*, and formed no part thereof.

Another Proclamation was made, under the hand of the Governor and seal of the Colony, dated the 27th of *September*, 1859, nominating a person to be the first returning Officer of the Municipality, and notifying that the first meeting of the electors of the Municipality would be held at noon, at such place at *Shoalhaven* as might be fixed for the purpose by public notice, on Wednesday, the 19th of *October*, 1859, for the nomination of electors, as candidates for election as Councillors for the Municipality, and for the purpose of the Act, which last-mentioned Proclamation was published in the Gazette on the 27th and 30th of *September*, 1859.

In pursuance of such Proclamation, Aldermen for the Municipality were in the last-mentioned month elected, and the Aldermen subsequently, on the 16th day of *February*, 1860, elected one of their number, the Appellant *Graham*, as the Mayor and Chairman of the Municipality.

It was agreed between the parties that the proceed-

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ings in the action on both sides, and all notices published by the Government in the Government Gazette, relative to the creation of the alleged Municipality, and all petitions to, and correspondence between, the Government and the Plaintiff, and the Petitioners for and against the creation of the Municipality, and all plans and documents relative thereto, should form part of the special case, and should be considered in evidence, and the parties respectively were to be at liberty to refer to any bye-law or minute of the Council of the Municipality.

The question for the opinion of the Court was—  
 “ Was the Municipality duly constituted or created in point of law ? ”

The following were the material sections of the Municipalities Act, 1858, the 22nd *Vict.* No. 13, referred to in the case, and upon which the question on appeal turned :—

“ Whereas it is expedient to establish Municipal institutions in certain Cities, Towns, and Districts of *New South Wales*. Be it, therefore, enacted by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of *New South Wales* in Parliament assembled, and by the authority of the same, as follows ” :—

Sec. 1. That any City, Town, or Hamlet, now or hereafter established, or any Rural District, may, as hereinafter provided, be constituted a Municipality.

Sec. 2. That the Governor, with the advice of the Executive Council, may, on the receipt of a petition signed by not fewer than fifty householders resident within any such City, Town, Hamlet, or Rural District, praying that the same may be declared a Muni-

cipality under this Act, and stating the number of the inhabitants thereof, cause the substance and prayer of such petition to be published in the Government Gazette, and unless a counter petition, signed by a greater number of householders, resident as aforesaid, be received by the Colonial Secretary within three months from the date of such publication, the Governor, with the advice aforesaid, may by Proclamation, published in like manner, declare such City, Town, or Hamlet, or such Rural District to be a Municipality by a name to be mentioned in such Proclamation, and may also by the same or any other Proclamation define the limits and boundaries thereof, and upon such publication the Municipality shall be constituted accordingly.

Sec. 3, provided for the division, if requested, of the divided Municipality into wards.

Sec. 4, enacted that, on the receipt of a petition, signed by fifty householders resident within any defined area adjoining to any such Municipality, praying that such area might be united therewith, the Governor, with the like advice, and after the like publication of such petition, and with the consent of the Council of such Municipality; and unless a counter petition, signed by a greater number of persons so situated as aforesaid, be received by the Colonial Secretary within three months from the date of such publication, might, by like Proclamation, published as aforesaid, declare such area to be united therewith and form part thereof. And, upon such Proclamation being so published, such area should be united with and form part of the same Municipality.

Sec. 5, provided for the division of the Municipalities themselves into other Municipalities.

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Sec. 6, enacted that, after the constitution of any Municipality by any such Proclamation, all previous proceedings hereinbefore required shall be deemed to have been duly taken, and no objection shall be allowed on the ground of any defect or irregularity in such proceedings, or any non-compliance with the provisions of this Act.

The case came on for argument before the Chief Justice, Sir *J. N. Dickinson*, and Mr. Justice *Wise*. On the 7th of *January*, 1862, the judgment of the Supreme Court was delivered by the Chief Justice in favour of the Plaintiff, to the effect, that the Municipality in question was not duly constituted in point of law.

The material part of the judgment, relating to this point, was as follows:—"Of these Defendants one is the Mayor of the Municipality of *Shoalhaven*, constituted under the 'Municipalities Act of 1858,' and the other is the Bailiff who executed a warrant of distress issued by the former against the goods of the Plaintiff for enforcing the payment of certain rates, to which he had been declared liable by the Council, in respect of property owned or occupied by him within the limits of the Municipality, and the action is brought to raise the question, whether the Municipality itself, for certain reasons, was or was not legally constituted. First, as to the constitution of the Municipality. By the Act, No. 13 of 1858, sec. 1 & 7, any City, Town, or Hamlet, then or thereafter established, or any Rural District, may be constituted a Municipality, the electors of which shall thereupon become and continue thenceforth to be a body corporate. On the receipt of a petition, (sec. 2,) signed by not fewer than fifty householders, resident within any such City, Town,

or Hamlet, or Rural District, praying that the same may be declared a Municipality, the Governor, with the advice of his Executive Council, may cause the substance and prayer of such petition to be published in the Gazette, and unless a counter petition, signed by a greater number of householders, residents as aforesaid, be received within three months afterwards, the Governor, with the like advice, may, by Proclamation published in like manner, declare 'such City, Town, or Hamlet, or such Rural District,' to be a Municipality, and may, by the same or any other Proclamation define its boundaries, and on such publication the Municipality shall be constituted accordingly. Then follows section 6, on which much reliance was placed by the Defendants, which enacts that 'After the constitution of any Municipality, by any such Proclamation, all previous proceedings hereinbefore required shall be deemed to have been duly taken, and no objection shall be allowed on the ground of any defect or irregularity in such proceedings, or any non-compliance with the provisions of this Act.' Above fifty householders it appears, after the passing of the Act, duly petitioned for a Municipality. They resided, however, not within one and the same Town, or one and the same Rural District, but in four neighbouring, though not strictly contiguous localities, of which one is a Town (or a place notified or proclaimed as such by the Government), and the other three are distinct Districts or places forming no part of the Town. Two of these are contiguous to the Town on different sides of it ; the third is on the opposite bank of a navigable river, and in a different County. The Act, it should be observed, requires no statement of boundaries in any petition for incorporation. The

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petition in this case, however, set forth boundaries, representing (as we collect) the four places sought to be incorporated, and these boundaries accordingly were advertised with the prayer. The Plaintiff, with some other residents or landowners, petitioned and remonstrated against the proposed constitution, but no counter petition was at any time presented, signed by a greater number of householders than those originally petitioning. After a few months, therefore, the Municipality of *Shoalhaven* was in fact (whether effectually or not) established. The Proclamation, however, defining its limits, omitted land which was described in the petition as within the designed area; while, on the other hand, it included some land not so described, and which formed no part of the four places sought and meant to be affected by that petition. Two objections, therefore, were submitted by the Plaintiff. First, on the supposition that a Town and Rural District could jointly be incorporated in, a petition to that effect, it was objected, that the Proclamation could, at all events, not go beyond and add lands in excess of the petition. Admitting that perhaps it was not impeachable for having included a less area than the petition asked for, his Counsel urged, that the Proclamation could not legally embrace more. If such a power existed, it was said an application might be published for one purpose, perhaps that of incorporating a place of small extent, while eventually the Proclamation might include, in the same Municipality, a Town or some Rural District of twice the size and population originally intended, in a very different direction, too, and several miles distant, the inhabitants of which, misled by the public limits, would have had no previous notice by which they

might have been enabled to prevent the annexation ; or, if they had in fact petitioned against it, the objection might have been taken, that they had no right to be heard, as counter petitions, can come only from the place petitioned for, and so they had no interest in the question. Secondly, however, it was objected that the Proclamation was altogether *ultra vires*, and had, by reason of its having united in the same Municipality, a Town and Rural Districts, the Act having in terms, and (it was maintained) for obvious purposes, distinguished the two classes, the argument being, that although the residents of either a Town ' or ' a Rural District may petition and each become separately a Municipality, the two cannot be conjoined, because the more numerous inhabitants of the former, with widely differing pursuits and antagonistic wants and interests, would at all times overpower the dispersed cultivators of farms, the breeders of sheep, or the tillers of the soil. We are of opinion, that both these objections are tenable in point of law. With respect to the first, which assumes that the unison of the places as proposed was unexceptionable, *Rutter v. Chapman* (8 Mee. & Wels. p. 1) is an authority for holding that the omission of portions of the places petitioned for as here, forms no objection to the incorporating instrument; for, as observed in that case, the limits of the District and Borough are required by the Statute itself to be defined in the instrument, which supplies an argument for concluding, that some discretion was meant to be conferred in adopting or rejecting the boundaries proposed by the Petitioners, and it might, in many cases, be inconvenient, if not unjust, to include in one and the same Municipality all the localities suggested, although perhaps actually

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included for Parliamentary and other purposes in the same District or Borough. But the converse of that case, the power of adding localities not originally proposed, and not forming part of any place from which the petition emanated, strikes us as being, clearly objectionable on all grounds here urged against it, and this opinion is supported, we conceive, in the recent similar case of *In re Todmorden* (30 L. J., Q. B., 305), in which none of the Judges appeared to doubt (although the particular application there failed) that the Secretary of State had not, in settling the boundaries under the Imperial Statute, 21st & 22nd Vict. c. 98, the power of extending those proposed by the petition. By that Statute, the ratepayers of any place not having a known or defined boundary, may petition one of the Secretaries of State to have it settled. Upon this, after certain proceedings, an order may be made under which the Statute may be adopted, and at a fixed date thereafter, it will have the force of law in that place. All those proceedings were taken, and a resolution was passed in *Todmorden* adopting the Statute, and the limited time had expired. The Court held, therefore, that the Complainant in that case (whose lands had been added to the area of *Todmorden* in excess of the boundaries proposed by the petition) was too late in seeking a remedy by *Certiorari*, and on that ground, but avowedly on that ground alone, the motion was refused. The decision in *The Queen v. Boucher* (3 Q. B. Rep. 655) does not touch the last-mentioned point. That case was also a proceeding by *Certiorari* (a writ, the issuing of which is ordinarily matter purely of discretion), in which objections were taken to the Charter of incorporation of *Birmingham*. The Charter was issued (or at least petitioned for, and os-

tensibly issued) under the Statute, 5th & 6th *Wm.* IV. c. 76, which authorizes the granting of various privileges to Municipalities. It was objected, that the Charter was invalid, or at any rate ineffectual, either to convey or support the conveyance of any such privilege, because the petition praying for it had not emanated, in fact, from a majority of the inhabitants, as the 5th & 6th *Wm.* IV. requires. It was objected to a second Charter granting a separate gaol and Quarter Sessions to the Borough under a clause in the Statute, that this was void on the ground of misrepresentation. The Court held, as to the latter objection, that it could only be taken in another form of proceeding, and, with respect to the former, the Court thought it already determined by the view taken of the same objection in *Rutter v. Chapman*. Now, in the last-mentioned case it was admitted that a petition from 'the inhabitants' of a Town or Borough was necessary, as a condition precedent to a Charter, conveying (as in that instance) the special franchises mentioned in the Statute. It was admitted, further, that the word 'inhabitants' meant a majority of them, and that the decision of the Privy Council upon any petition purporting to be from the inhabitants of a place, and the issue of a Charter to it accordingly, did not conclude or judicially determine the matter. But the Judges thought that, nevertheless, the Patent was good (subsequent acceptance by the grantees being shown) as a Charter from the Crown at Common Law. So that in *The Queen v. Boucher* the Court seems to have held, that there was a valid subsisting Charter, and, therefore, an existing Municipality, to which the subsequent grant could legally be applied. It appears also to have been considered in both cases,

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that as in the one there was an assent expressly found, and in the other there was no expressed dissent, the actual petition of a large number of the inhabitants, and the silence of the remainder (the Statute not requiring any petition to be signed, or even to be in writing), amounted to a petition from the whole. But the main decision in *The Queen v. Boucher* was, that so important a question as the validity of a Royal grant ought not to be disposed of, except on a writ expressly to repeal it. In this case, however, the whole proceeding is statutory, no *Scire facias* would lie to repeal a Proclamation merely, and there is no course open, therefore, but the present. As to the second objection taken for the Plaintiff, we have found no authority, but on general principles of construction, and for the reasons suggested on the argument, we entertain no doubt that the union of a Town or Township and a Rural District or Districts, as in this case, in one and the same Municipality, is not authorized by our local Act. The language of the first section, in which the power of incorporating is conferred, and of the second, in which the mode of petitioning and acting on the petition are provided for, and the enactment in section 4, by which 'any defined area,' adjoining a Municipality, may be united to it, alike tend to show that Towns, or the more thickly inhabited places resembling Towns, and Rural Districts forming no portion of any Town, were considered and meant to be dealt with as different things, the erection of which into Municipalities respectively, was to be separately petitioned for each by itself, and separately dealt with accordingly. Thus, in the first section, any Town, or City, or Hamlet, then or thereafter established, or any Rural District may be incor-

porated. In the second section the petition for incorporation is to be signed by fifty householders resident within any such City, Town, Hamlet, or Rural District, praying that 'the same' may be incorporated. A counter petition must be signed also by householders resident as aforesaid, that is to say—resident in the same Town, City, or Hamlet, or in the same Rural District from which the original petition emanated. If this be not the true construction, most unjust and startling consequences may follow—any Town in the Colony mustering fifty householders, or less, if supported by some residents in any given country district, unitedly making up the required number, may apply to be formed into a Municipality with that District, although, perhaps, several miles distant, and possessing inevitably, from the very nature of the localities and their position severally, no community whatever of interests, and unless a greater number of residents forming that District (which probably may be a grazing country, and, therefore, sparsely peopled) shall petition in due time against the annexation, the object of the Town residents will be accomplished. We cannot believe that such results as these were meant to be sanctioned. It may or may not be desirable and just, that country lands reasonably adjacent to a Town or Township should be made to contribute to its improvement, and it is possible that both would unitedly be benefited by the operation, and might in such a case be combined under proper limitations to carry it on in concert. But to suppose it to have been intended that the inhabitants of a Town, outnumbering the dispersed population of a distant country District by perhaps five or more to one, the two parties occupying lands utterly dissimilar

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in use and character, and having interests in respect thereof mutually antagonistic, might be formed into one Corporation or Municipality to act together in concert for purposes common to both (for such is the true idea of a corporate body), would, in our opinion, be to do equal violence to reason and to the natural and grammatical construction of the enactments. We have supposed cases in which the union of particular areas might be desirable, but for these the Act distinctly makes provision. These areas may be either Towns or adjacent Districts or portions of them only. In any event, however, they must adjoin some Town or other place or District already forming a Municipality. In such cases, at the instance of the inhabitants of any such area, and with the consent of the existing Corporation, the union may under section 4 be accomplished. The use of the term 'area' in that section shows, that here the uniting of Towns and Rural Districts, or of detached parts of each if adjoining an already created Municipality, was contemplated. Nevertheless, the assent of both parties is made necessary; but under the first and second sections, on the construction contended for by the Defendants, any Town may be united to three other areas, provided a majority of the four (taken together) petition, although a large majority of each of the three others in fact do not concur, but dissent and oppose. With respect to each of the two objections sustained by us, I had felt some difficulty. As to the first, I doubted whether the additions made by the Proclamation to the area originally published were not merely to correct the alleged boundaries of the four places named in the petition, and so whether the substituted area was, in effect, in excess of the

original one. The Proclamation, it is true, can only incorporate the petitioning Town or District ; but by the express terms of section 2 it may 'define' its boundaries, and if no more had been done than to describe accurately the Town and Districts sought to be and afterwards actually incorporated, and thus correct a previous misdescription, I should have thought this within the power given. But the special case appears to me on the whole to admit that there was in fact an extension ; that is to say, one beyond the true limits of those places. And we must conclude in the absence of evidence of, or any suggestion to, the contrary, that the petition stated the limits accurately, since it prayed for the incorporation of the places according to those limits. In this result we both concur ; and we are of opinion that, had the admitted excess been trivial, or such as was perhaps the result of inadvertence, not materially affecting any non-assenting party, the maxim '*De minimis non curat lex*' might be immaterial. But we find by the special case in connection with its accompanying map, that the additions, although of no great extent as compared with the whole, are of a more serious and important character. The other difficulty felt by me was, as to the second objection taken. I doubted whether we could sufficiently collect that the three places, which it was admitted formed no part of the Town, are Rural Districts in the sense used in the Statute. On examining the map, however, which it was agreed should be taken as part of the case, I think it plain that they are so. The Town, although at present a very small one, is unmistakably indicated by marked lines of streets, and a 'reserve' for public recreation. Of the other tracts, one por-

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tion appears to comprise (at no very great distance from the Town) above sixty small allotments. These may, for aught I know, constitute a village, or the site for one. The word 'Hamlet' was introduced into the Act probably to indicate a village or small Town, although, strictly speaking, I believe it is rather a suburb to a Town. But to the north-east of the Town in this case, as shown by the map, though by no means in any fair sense adjoining it, there lies within the described boundaries a considerable tract of country, containing about 16,000 acres, which unquestionably and obviously is a Rural District, or part of one. But it was maintained in answer, that the Proclamation was nevertheless not invalid, for all objections to it are avoided by force of the sixth section already read by me. We are of opinion, that the provisions of that section have not the effect attributed to them. The enactment will no doubt cure, as it was intended to do, many defects, and perhaps every mere irregularity, or mere omission to comply with provisions of the Statute. But it cannot be taken, in the absence of express words, that an effect so sweeping as the one contended for, which would set the Executive above the Statute, and render unimpeachable every act done in constituting a Municipality, however contrary to law, was intended to be or has been enacted by the Legislature. The illegality imputed to the Proclamation is, that it has assumed to incorporate localities from which, in effect, no petition proceeded, and to unite in the same Municipality a Town and also Rural Districts. Each of these acts on the part of the Executive, as we think has here been shown, was in excess of its powers. The protecting

sixth section, therefore, obviously does not apply to such a case. If it does, what other illegality may it not cover? Proceedings before the Proclamation, it is enacted, shall be deemed to have been duly taken. So non-compliance with any provisions of the Act is excused. But these matters, it is too clear for dispute, are not instances of non-compliance. They are simply unwarranted assumptions of a jurisdiction never existing. They were not omissions or irregularities, but positive acts done wholly without authority, and not 'before' the Proclamation, but in and by the Proclamation itself, which, therefore, for that reason, we are of opinion, are absolutely void. It would not by any means be clear, even if the words used in section 6 had been much more stringent, that the same duty would not have devolved on us. The constitution has assigned to the Queen's Bench, whose powers are by Statute vested in this Colony in the Supreme Court, the province of watching over all Tribunals of inferior jurisdiction, and where any is unduly assumed or there has been excess in its exercise, to control or correct the error. So inalienable is this province, that in cases of the former class the Court still retains and will exercise the power of issuing a *Certiorari* for the purpose of bringing before it and quashing an illegal order, even though Parliament may in express terms have taken the writ away. Instances of this will be found in *The Queen v. The Cheltenham Commissioners* (1 Q. B. Rep., 474), and *The Queen v. Rose* (24 L. J., N.S.M.C., 130). 'The clause which takes away the *Certiorari*,' says Lord Denman, in the former of those cases, 'does not preclude our exercising a superintendence over the proceedings, so

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far as to see what is done shall be in pursuance of the Statute. The Statute cannot affect our right and duty to see justice executed.' The observations of Lord Chief Justice *Cockburn* also, in the *Todmorden* case, as to the final inefficiency of orders made under colour of a Statute, but not warranted by it, may be referred to. But it is at present unnecessary to go more fully into this point."

Mr. Justice WISE said: "I only wish to add one or two observations. I entirely concur with the principles laid down in the judgment just delivered; but I entertain some doubt whether, in point of fact, there was such an excess in the limits defined for the Municipality as to make the Proclamation void on that ground. This doubt, however, does not in the least affect the result, for the Proclamation is void because it affects to unite a 'Town' and a 'Rural District,' for the reasons so fully and satisfactorily stated in the judgment. I think it right also to mention, as an additional reason for the Court giving its decision upon both the points, that, in consequence of the special case being agreed to by the parties, the Defendants submitted to a verdict in a second action then about to be tried before me without any evidence being adduced on either side."

[29th Nov.  
 1862.\*

The Appellants allowed the time fixed for appealing to Her Majesty in Council to expire without appealing. They, however, presented a special petition to Her Majesty in Council for leave to appeal.

\* Present :—Lord Chelmsford, the Lord Justice Knight Bruce, the Lord Justice Turner, Sir Edward Ryan, and Sir John Taylor Coleridge.

Sir *Hugh Cairns*, Q.C., and Mr. *Watkin Williams*, in support of the application.

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Although the time limited for appealing to Her Majesty in Council from the Supreme Court at *New South Wales* has expired, yet, as the decision in this case involves an important question affecting the government of the Colony, it is absolutely necessary to have the construction of the Proclamation in respect to this case, as well as the Municipalities Act, 22nd *Vict.* No. 13, finally decided.

The Solicitor-General (Sir *R. Palmer*) opposed.

It would impose a great hardship upon *Berry* if the appeal is to be admitted and involve him in costs. If it affects the government of the Colony, the Governor should have been a party.

Lord CHELMSFORD :

Their Lordships are disposed to admit the appeal, as the question desired to be determined affects the interest of the Colony, but in admitting the appeal, their Lordships are of opinion, that it is to be without prejudice to a judgment obtained by the Respondent, arising out of this matter, and that the Petitioners give security in the sum of £300, and also that the Petitioners give security by Bond to indemnify *Berry*, free of all costs and expenses which may be incurred by the prosecution of the appeal (*a*).

By an Order of Her Majesty in Council, dated the

(*a*) See *Spooner v. Juddow*, 6 Moore's P. C. Cases, 257, where, in granting leave to appeal, the amount at issue being trifling, though involving an important question of law, terms were imposed for payment of the Respondent's costs to prevent the question being argued *ex parte*.

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9th of *January*, 1863, after stating the report of the Judicial Committee of the Privy Council, whereby their Lordships reported, amongst other things, their opinion, that leave ought to be granted to the Petitioners to enter and prosecute their appeal from the decision of the Supreme Court of the 7th of *February*, 1862, on the first question of the special case, and that such appeal was to be without prejudice to the judgment for damages and costs already obtained by the Respondent on the 13th of *August*, 1861, and that the Petitioners were to lodge £300 sterling, as therein mentioned, to abide the award and order of their Lordships as to the costs of the Respondent, whatever might be the result of the appeal, and likewise to enter into further security by Bond, as therein mentioned, to hold the Respondent free of all expenses arising out of the prosecution of the appeal; it was ordered that the Petitioners should be at liberty to enter and prosecute their appeal from the decision of the Supreme Court of the Colony of the 7th day of *February*, 1862, on the first question of the special case, and that the appeal should be subject to all the conditions in the report of the Judicial Committee of the Privy Council set forth and recommended.

These conditions having been complied with, the appeal now came on for hearing on the first question raised by the special case.

Sir *Hugh Cairns*, Q.C., Mr. *Mellish*, Q.C., and  
Mr. *Watkin Williams*, for the Appellants.

We maintain that the Municipality of *Shoalhaven* was duly constituted according to the provisions of the

Municipalities Act of the Colony, the 22nd *Vict.* No. 13, and that the incorporation of the Town of *Nowra*, with the Rural Districts of *Greenhills* and *Good Dog*, was not, as held by the Supreme Court *ultra vires* the authority of the Governor. All the requisites of the Municipalities Act were sufficiently complied with. The petition for incorporation was signed, as appears by the Proclamation, by upwards of one hundred persons residing at *Nowra*, *Nowra Hill*, *Greenhills*, and *Good Dog*, praying that these places might be incorporated into two wards, and proclaimed a Municipality. Now, above fifty of these Petitioners were resident in the Town of *Nowra*; the others, it is true, were residents in neighbouring, although not contiguous Districts; but though the Respondent, with some others, remonstrated against the proposed incorporation, no counter petition signed by a greater number of householders, as required by section 4 of the Act (*a*), was presented; and the District, with its boundaries, was duly proclaimed and established a Municipality. It may be that some small portion of the land included in the petition was omitted to be incorporated by the Proclamation, and some land not described in the petition substituted in its stead; but we apprehend that, provided there was no great disparagement between the boundaries contained in the petition, and those fixed in the Proclamation, in the absence of any counter petition under the Act, it was competent to the Governor to define the boundaries, and the doing so was not *ultra vires* his authority under the Act. *Rutter v. Chapman* (*b*) is an authority for holding that the omission of portions of the plans petitioned

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(*a*) Ante p. 213.

(*b*) 8 Mee. & Wels. 1 & 36.



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for, as here, forms no objection to the incorporating instrument. This case was observed on by the Court below, and the cases *In re the District of Todmorden* (a) and *The Queen v. Boucher* (b), were also commented on by the learned Chief Justice in his judgment. Then, again, as to the incorporation of a Rural District, we submit, that if the Governor had power to define the boundaries, it is no legal objection that he included a Rural District in the Proclamation.

The Attorney-General (Sir R. Palmer), and Mr. G. Lake Russell, for the Respondent.

The decision of the Supreme Court was correct and in strict conformity to the local Act and laws of the Colony, having reference to the facts disclosed and admitted by the special case. The Colonial Act, 22nd *Vict.* No. 13, sec. 2, requires in the same way as the Imperial Act, 5th & 6th *Vict.* c. 70, sec. 41, that the boundaries should be set out and defined in the petition for incorporation, that is of the very essence of an incorporation. *Rutter v. Chapman* (c), is not an authority for the position taken by the Appellants. The Court below rightly decided on the principle of the case of *re the Districts of Todmorden*, reported as *Espte. Smith* (d) and *The Queen v. Boucher* (e). There are two fatal objections to the Proclamation. First, we say, that the petition did not emanate from any place contemplated by the Act, 22nd *Vict.* No. 13; the Petitioners not being residents within any City, Town, Hamlet, or

(a) 30 L. J. Q. B. N. S. 305.

(c) 8 Mee. & Wels. pp. 1-36.

(e) 3 Q. B. Rep. 655.

(b) 3 Q. B. Rep. 655.

(d) 1 Best & Sm. 15, 412.

Rural District, as is there intended : the Proclamation, therefore, which was issued in pursuance of such petition, was bad as being *ultra vires*. Secondly, it included within the boundaries therein specified, a Town and Rural Districts. Moreover, it departed from the boundaries specified in the petition and the notice published in the Gazette, omitting some places comprised in the petition and notice, and including others which were not comprised therein. All those places were important in extent, position, and population, and from some of which no petition was presented. The Municipality proclaimed was, therefore, neither the one asked for, nor the one which the Governor had power to constitute.

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Their Lordships' judgment was delivered by

Lord KINGSDOWN.

This is an appeal from a decision of the Supreme Court of the Colony of *New South Wales*, on a special case.

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The only question which we have to consider is, whether the Municipality mentioned in the case was duly constituted or created in point of law.

The Court below has decided that the Municipality was not duly constituted or created.

The Appellants, one of whom has been appointed Mayor of the Municipality, and the other of whom is a Bailiff who has acted under his authority, have brought this decision by appeal before Her Majesty in Council. The Respondent, *Berry*, who is a large landholder within the District thus alleged to have been incorporated, appears to maintain the judgment.

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The question depends mainly upon the construction of a Colonial Act, entitled, "The Municipalities Act, 1858."

By this Act, after reciting that it was expedient to establish municipal institutions in certain Cities, Towns, and Districts of *New South Wales*, it was, amongst other things, enacted as follows:—

1. Any City, Town, or Hamlet, now or hereafter established, or any Rural District, as hereinafter provided, may be constituted a Municipality.

2. The Governor, with the advice of the Executive Council, may, on the receipt of a petition signed by not fewer than fifty householders resident within any such City, Town, Hamlet, or Rural District, praying that the same may be declared a Municipality under this Act, and stating the number of the inhabitants thereof, cause the substance and prayer of such petition to be published in the Government "Gazette;" and unless a counter petition signed by a greater number of householders, resident as aforesaid, be received by the Colonial Secretary within three months from the date of such Proclamation, the Governor, by the advice aforesaid, may, by Proclamation published in like manner, declare such City, Town, or Hamlet, or such Rural District, to be a Municipality, by a name to be mentioned in such Proclamation; and may also, by the same or any other Proclamation, define the limits and boundaries thereof, and upon such publication the Municipality shall be constituted accordingly.

After providing by the three following sections for the division, if desired, of a Municipality into wards, and for the annexation of additional areas to Municipalities, the 6th section enacts:—"After the con-

stitution of any Municipality by any such Proclamation, all previous proceedings hereinbefore required shall be deemed to have been duly taken, and no objection shall be allowed on the ground of any defect or irregularity in such proceedings, or any non-compliance with the provisions of this Act."

After the passing of this Act, certain persons describing themselves as householders residing at *Nowra* and *Nowra Hill*, *Greenhills*, and *Good Dog* presented a petition to the then Governor of the Colony, in which they stated, that they were desirous of availing themselves of the powers of Municipal self-government, and of the endowment connected therewith under the Municipalities Act; that the population of the Town of *Nowra* and suburbs amounted to not fewer than 600. They suggested certain proposed boundaries in the Municipality which were then described in great detail. The petition then stated that the Petitioners desired that the Town of *Nowra* and suburbs should be divided into two wards; that the *Shoalham* River be the boundary of each ward; and that the said wards be incorporated by the designation of the *Nowra* and *Good Dog* wards.

The petition, therefore, treated the whole District proposed to be incorporated as a Town and its suburbs.

It did not represent the proposed boundaries as corresponding with the limits of any known or ascertained Districts, or assign any reason why these boundaries would be the most convenient.

The prayer of the petition was in these words:—  
"That your Excellency and the Honourable the Executive Council may be pleased to take the premises into consideration, and that the said Town of *Nowra* and *Nowra Hill*, *Greenhills*, and *Good Dog*

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may be divided into two wards, and proclaimed, with the boundaries aforesaid, a Municipality under the Municipalities Act of 1858."

The District proposed to be incorporated is within the police district of *Shoalhaven*; and a counter petition was presented by the Respondent and many other householders in that District, praying that no such incorporation might take place.

After various advertisements had been issued, as directed by the Act, the Governor, with the advice of his Executive Council, issued a Proclamation, dated the 21st of *September*, 1859, which, after reciting the powers given by the Act and the petition for incorporation, and its publication in the Government Gazette, and that no counter petition, signed by a greater number of householders resident within the Rural District of *Nowra* and *Nowra Hill, Greenhills*, and *Good Dog* was received by the Colonial Secretary within three months from the date of such publication, and reciting that the Governor, with the advice of the Executive Council, had, in exercise of the powers conferred by the Act, determined to declare by Proclamation such Rural District to be a Municipality by the name thereafter mentioned, and to divide the Municipality into two wards, with the limits and boundaries thereafter defined, the Governor proceeded to declare that the District to be divided into two wards thereafter described should be a Municipality within the meaning of the Act, and that the limits and boundaries of the Municipality and limits and boundaries of the wards forming the Municipality should be as follows. The Proclamation then proceeds to define the boundaries by lines to be drawn from certain

known points to other known points. It defines in like manner the limits of the wards, which are to be called *Nowra* and *Good Dog* wards, and directs that the Municipality shall be called by the name of the Municipality of *Shoalhaven*.

It will be observed that the Proclamation speaks of the District to be incorporated in very different terms from the petition. The Proclamation describes it as a Rural District; whereas the petition had spoken of it as the Town of *Nowra* and suburbs.

By the map referred to and made evidence by the special case, it appears that what is called the Town of *Nowra* consists, including outhouses and barns and unfinished houses, of twenty-one houses, and that the population consists of fourteen men, twelve women, and thirty-seven children. The District described in the petition as suburbs is of a very irregular shape, extending in its greatest length about fourteen miles, and in its greatest breadth to about eight miles, and as it seems that the whole population of the town is only sixty-three, and the population of the town and suburbs, as referred to, is represented to be not less than 600, the population of the remainder of the district must have been above 500.

It is at least very singular that such a District should have been described by the Petitioners as the suburbs of such a Town.

The objections, however, raised by the Respondent to the validity of this incorporation were not that the Governor having been asked to incorporate a Town and suburbs had incorporated a Rural District, but quite of a different character. They were two:—

First, that the Governor by his Proclamation had

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incorporated a Rural District with a Town, which the law did not allow.

Second, that he had included in the incorporation some lands which the Petitioners had not prayed to have included, and had omitted others which the Petitioners had prayed to have included.

The first objection depends on the 1st and 2nd sections of the Act:—

The 1st section declares, that any City, Town, or Hamlet, now or hereafter to be established, or any Rural District, may be constituted a Municipality.

The 2nd section provides, that after certain proceedings described in the Act, the Governor may by Proclamation declare such City, Town, or Hamlet, or such Rural District, to be a Municipality.

Upon the language of these sections it is argued, that a distinction is drawn between a City, Town, or Hamlet on the one hand, and a Rural District on the other, and that a Town and a Rural District cannot be incorporated in one Municipality. Now, it is said *Noura* is a Town, and cannot be incorporated with the remainder of the lands included by the Proclamation in one Municipality.

The reason for this is said to be, that the interests of the Town may be diametrically opposed to those of the Rural District, and that as the question is to depend in a great measure on the majority of votes of the inhabitants, a populous Town may procure to be incorporated with it, and make subject to its burthens a very large and wealthy district much more thinly populated, deriving no benefit whatever from the Town, and strongly objecting to any connection with it. This inconvenience is pointed out very forcibly in the judgment delivered in the Court below.

That such injustice might be attempted unless the construction of the Act contended for by the Respondent be maintained, is certainly true; but, on the other hand, the success of such an attempt can scarcely be supposed possible, since the issuing of the Proclamation is to depend upon the discretion of the Governor, with the consent of the Executive Council, and no Governor or Council would be likely to sanction such a proceeding.

But the inconveniences to arise from the opposite construction are more serious, and not to be remedied by the exercise of any discretion on the part of the Governor or his Council. If a Rural District cannot be incorporated in which a City is contained, neither can it be incorporated where a Hamlet is found in it. In this case what is called a Town consists of twenty-one houses, some unfinished. If a collection of twenty-one houses may make a Town, how many may make a Hamlet? Half-a-dozen houses within a short distance of each other might perhaps answer the description. How would it be possible to find any Rural District desiring incorporation in which a Hamlet would not be found? It appears to their Lordships that, even if the construction insisted on by the Respondent were correct (which they think that it is not), it may be doubtful whether the place called a Town in this case would be a Town within the meaning of the Act. It is stated in the special case, that *Nowra* at the date of the petition and Proclamation was and still is a place proclaimed by the Governor as a Town, and was and is a Town wherein fermented and spirituous liquors may be sold in quantities not less than two gallons at one time; but it seems little to resemble a Town in any other particular. But it is

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not necessary to express an opinion on this point ; on the other ground we think that the incorporation of the Rural District described in the Proclamation is not invalidated, because the Town, as it is called, of *Nourra* is included in it.

The other objection is of a more serious character. It was fairly admitted by the Appellants' Counsel at the hearing, that if {by the Proclamation considerable quantities of land were included in the Municipality which the Petitioners had not prayed to have included, the incorporation could not be supported. Now, upon this objection we think we are concluded by the statement in the special case in these words: —“The area set forth in the said Proclamation as thereby declared to be incorporated includes land which was not included in the said petition for incorporation, and omits land which was included in the said petition.”

The map to which we have already referred shows the boundaries of the District which the Petitioners prayed to have incorporated, and the boundaries of the District which the Proclamation incorporated, and there can be no doubt that considerable quantities of land are included in the latter which are not included in the former.

If, therefore, the petition be understood as praying that the District included in the boundaries which it suggests may be incorporated, there can be no doubt that the objection urged by the Respondent is well founded.

But it is said that this is not the true meaning of the petition, and that it means to ask that four Districts known by the names of *Nourra*, *Nourra Hill*, *Green Hills*, and *Good Dog*, may be incorporated,

and it is contended, that the boundaries suggested are not an essential part of the description. But supposing this to be the meaning of the petition, there is no statement whatever in the case that the lands included in the Proclamation and omitted in the petition are part of any of these Districts, and on the contrary, the statement in the special case is distinct, that, read the petition as we may, lands not included in the petition for incorporation are incorporated by the Proclamation.

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This objection appears to us to be fatal.

There still remains to be considered how far the objection can be cured by the effect of the sixth clause.

We are clearly of opinion, that this clause cannot be held to have the effect of dispensing with the conditions which by the other clauses of the Act are made essential to the exercise of authority by the Governor and Executive Council. One essential condition is, that there shall be a majority of the inhabitants within the District sought to be incorporated, in favour of the incorporation. But the petition and counter petition are confined to persons residing within the area sought to be incorporated, and if the incorporation may include any quantities of land not included in the petition, that condition is entirely disregarded, and a District may be incorporated though a majority of the inhabitants within it may be opposed to the incorporation. If the 6th clause is to have the effect contended for, an incorporation proclaimed by the Governor could not be disputed though every inhabitant within the District had petitioned against it.

It is plain that the 6th clause was meant to supersede the necessity, after a Proclamation of incorpora-

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tion, of proving the proceedings on which it had been founded and to cure any irregularities or defects in those proceedings as leading to the Proclamation, and that it does not apply to a radical vice in the Proclamation itself.

We must, therefore, humbly report to Her Majesty our opinion, that the Municipality in question was not duly constituted or created in point of law and that the appeal should be dismissed. By the terms of the Order admitting the appeal, the Appellants are to pay the expenses of it, whatever may be the result.

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### ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

EDWARD WILHELM OHRLOFF AND } *Appellants,*  
OTHERS - - - - - }

AND

T. & H. BRISCALL & Co. - - *Respondents.\**

#### THE "HELENE."

16th June,  
1865.

A suit in rem was instituted in the Admiralty Court under the Statute, 24th Vict. c. 10, sec. 6, against a Foreign vessel to recover damages to the cargo by negligence. The owners of the vessel were Foreigners resident abroad. The ship was arrested for £600, the estimated amount of the damages and costs, and a Bail-bond being

THIS was an application by the Respondents for the Appellants to give security for costs, under the following circumstances :—

In the month of *November*, 1864, the Respondents

\* Present :—The Lord Justice Knight Bruce, Sir John Taylor Coleridge, and Sir Edward Vaughan Williams.

brought a suit in the Court of Admiralty under the Act, 24th *Vict.* c. 10, s. 6, against the "*Helene*," a Prussian vessel, for damages for loss of part of a cargo of oil, by reason of the negligence of the Appellants' servants. The loss was estimated by the Respondents at £432. 16s., and the suit was brought for £600 to cover costs. The vessel was arrested but released on the owners, the Appellants, appearing and giving bail to the amount of £600, to answer judgment. Judgment was given by the Admiralty Court for the Respondents, condemning the Appellants in damages and costs. The costs in the Court below, together with the damages, exceeded the amount for which bail had been given. The Appellants, who were Foreigners resident in the Kingdom of *Prussia*, appealed to the Privy Council, and the Respondents now applied for further security from the Appellants to answer the costs, as well in the Court below as upon appeal, or in the alternative, that the appeal be dismissed. The application was supported by an affidavit of the Solicitor of the Respondents setting forth the above facts.

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Mr. *V. Lushington*, for the Respondents.

In ordinary cases, if the party suing is a Foreigner resident out of the jurisdiction of the Admiralty

given for that amount, the ship was released. By the decree of the Admiralty Court the damages and costs awarded exceeded the amount of the Bail-bond. The Foreign owners having appealed to the Privy Council from that decree, the Respondents applied for further security; first, for the costs incurred in the Court below uncovered by the Bail-bond, and secondly, for the costs of the appeal. Held:—

First, that a Court of appeal could not entertain so much of the application as related to the costs incurred in the Court below; but—

Secondly, that as the 33rd section of Statute, 24th *Vict.* c. 10, was not yet in operation, and the Appellants being Foreigners resident abroad, the rule requiring Foreigners appealing, to find security for costs, was still in force, and security directed to be given by the Appellants for the costs of appeal.

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Court, he is called upon to give security for costs. Upon that ground, therefore, we submit that the Appellants ought to give security for the costs of the appeal together with such costs in the Court below as are not covered by the Bail-bond. The proceeding being *in rem* does not affect the former practice observed in cases of Foreigners resident abroad who appeal to this Tribunal. [Sir *Edward V. Williams*: It is similar to an application for increase of bail at Common Law.] There are precedents in the practice of the Admiralty Court in which further security has been ordered.

Mr. R. G. Williams, for the Appellants, *contra*.

As the appeal is a matter of right and not of favour, so much of this application as relates to costs in the Court below cannot in any circumstances be entertained. [He was stopped on this point. The Lord Justice *Knight Bruce* expressing their Lordships' opinion, that they could not entertain the application for security for costs incurred in the Court below.] Then with respect to the application on the second ground to increase the security for costs of appeal, the facts do not warrant the exercise of such a discretion by the appellate Court. No authority is cited for the contention that a Foreigner domiciled abroad is to give security for costs of appeal in addition to the Bail-bond. In this instance it is really asking the appellate Court to increase the amount of security which the Respondents themselves have actually fixed by the Bail-bond. The Respondents elected to proceed *in rem* under the 6th section of the Statute, 24th Vict. c. 10, instead of *in personam*, and bail might have been taken under sec. 33 of that Statute to an amount

sufficient to have covered the costs of appeal as well as the original suit. Whenever the costs are taxed the bail is liable, and the old practice was that the security given was as well for costs in the Court below as on appeal. The Plaintiffs cannot now have the additional remedy, or at all events if further security is required, this Tribunal will not dismiss the appeal for want of sufficient security for costs. By analogy to the practice of Courts of Common Law, the proceedings should only be stayed.

Mr. *V. Lushington*, in reply.

Before the Statute, 24th *Vict.* c. 10, it was the practice, where a Foreigner resident abroad appealed, to enter into a separate Bail-bond for costs of the appeal. The fact that the proceedings are *in rem* under the 6th section of that Statute does not displace the old practice, nor is it an argument that the ordinary rule, requiring foreign Appellants to give security, should be departed from. The form of the Bail-bond is the same as was in use before the passing of the Statute, 24th *Vict.* c. 10, and only covers the costs incurred in the Court below. The 33rd section of that Statute, providing that bail given in that Court is to answer the judgment of the Admiralty Court as well as of the Court of appeal, has not yet come in force, and cannot be acted upon until a new form of Bail-bond has been sanctioned by an Order in Council.

The Lord Justice KNIGHT BRUCE :

If it be admitted that security is given in cases where the Appellant is out of the jurisdiction, what is there to exempt this case from the ordinary

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rule? The form of the Bail-bond is the same now in use as it was before the Admiralty Court Act of 1861 (the 24th *Vict.* c. 10) came into operation. It was then construed to have reference only to costs in the Court of Admiralty, and not to extend to costs in the appellate Court. Their Lordships see no reason for holding that that Statute introduces a change of interpretation on the old form of Bail-bond. Section 33 of that Statute gives power to the Court of Admiralty to extend its requirements by a new form of Bail-bond. That power, however, is discretionary, and although the Court of Admiralty has authority to make new forms, that could only be done under the sanction of an Order in Council, which has not yet been obtained, though we understand that a new form will speedily be issued. The old form of Bond, therefore, alone exists, and must be construed as it always has been. There is consequently no security for the costs of this appeal, and the Appellants, being Foreigners domiciled abroad, must, according to the ordinary rule, give security for costs. Their Lordships are of opinion, having regard to the amount of issue and of the expense of appeal, that Bail to the amount of £200 should be given within three months to answer costs of appeal, and in default the appeal to be dismissed. Costs of this application to be costs in the cause.

ON APPEAL FROM THE HIGH COURT OF  
ADMIRALTY.

THE OWNERS OF THE NORWAY - *Appellants,*

AND

GEORGE ASHBURNER - *Respondent.\**

THE "NORWAY."

THIS suit was brought by the Respondent, one of the partners and representative in *England* of the firm of *Ashburner & Co., of Calcutta*, against the "*Norway*," an American ship. The Respondent

16th, 27th,  
& 28th June,  
1865.

By a Charter-party, it was stipulated by the Charterer and the Master, that the vessel should

\* Present:—The Lord Justice Knight Bruce, Sir John Taylor Coleridge, and Sir Edward Vaughan Williams.

load an outward cargo, proceed to *Rangoon* a river port in *India*, and there load a homeward cargo. The Master guaranteed the vessel to carry 3,000 tons dead weight upon a draught of twenty-six feet; to return to one of the ports mentioned in the Charter-party at the Charterer's option, and there to discharge the cargo. Freight was to be paid in a lump sum, part in advance before sailing from *England*, part on the voyage, and on arrival at return of port of delivery, and the remainder on the final delivery of the cargo.

The vessel loaded at *Rangoon* a quantity of rice, as much as she could carry down the river *Irrawaddy*, but which amounted to less than 3,000 tons dead weight. In consequence of the negligence of a Pilot, taken on board by the Master, the vessel grounded in that river. She was got off, but afterwards at sea sprang a leak, and to save the vessel part of the cargo was thrown overboard, and other damaged portions were sold at *Mauritius*, a port she stopped at to repair on her homeward voyage, where the remaining portion was reshipped. When the vessel arrived at *Liverpool*, a port of discharge mentioned in the Charter-party, the Master claimed a sum of money as lump freight, larger than was really due, as well as a sum for general average contribution, and without going the length of refusing to deliver any, he insisted upon keeping in his possession a part of the cargo to cover his demand for freight he considered due. A tender was made by the Assignee of the Bill of lading of the amount considered by him due, and he undertook to give security for the remainder. The Master refused this offer, and took the vessel into a dock, other than that



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sued under the provisions of the 6th section of the Admiralty Court Act, 1861, as owner and Assignee of the Bills of lading of a cargo of rice carried into *Liverpool*, in the "*Norway*," in respect of breaches of contract and duty, in the conveyance, detention, and discharge of the cargo.

The suit was *in rem*, against the ship, no owner or part owner being domiciled in *England*, under the provisions of the Admiralty Act of 1861, 24th *Vict.* c. 10, sec. 6, which provides, "That the High Court of Admiralty shall have jurisdiction over any claim of the owner, or Consignee, or Assignee, of any Bill of lading of any goods carried into port in *England* or *Wales*, in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract, on the

named by the Charterer, and the cargo of rice was unladen without assortment, as was customary. In these circumstances the Assignee of the Bill of lading brought a suit *in rem*, pursuant to the 24th *Vict.* c. 10, in the Admiralty Court, against the vessel for damages in respect of breaches of contract and duty. Held:—

First, that as both parties contemplated that a cargo might be laden in a river, the guarantee that the vessel would carry 3,000 tons dead weight, in a draught of twenty-six feet, applied alike to fresh and salt water, and that there was a breach of contract.

Second, that with respect to the cargo jettisoned, and the damaged rice sold in *Mauritius* in the absence of the Plaintiff proving affirmatively the negligence of the Pilot, or the want of prudence on the part of the Master, that there ought to be no deduction from the lump freight on account of non-delivery, as it arose from the perils of the sea.

Third, that the demand by the Master of a larger sum than was due, and the refusal by him to deliver the cargo was so made that it amounted to an announcement by him that it would be useless to tender any smaller sum, for if tendered it would be refused, and that such refusal constituted a constructive waiver of any tender; and further that a peremptory claim for general average came within the rule as to dispensation of tender.

Fourth, that the Master was not liable for damages for the non-assortment of the cargo, as the Assignee could by complying with the terms of the Statute, 25th & 26th *Vict.* c. 63, sec. 67, have landed the rice himself.

Held further, that in estimating the damages for non-delivery of the cargo, the Assignee was entitled under the provisions of the Admiralty Act, 1861, to be indemnified for the loss of interest for the wrongful withholding of the cargo, and for insurance and interest.

The holder of a Bill of lading, comprising the whole cargo, has by custom a right to deduct "Address commission" from the freight.

part of the owner, Master, or crew of the ship, unless it be shown to the satisfaction of the Court, that at the time of the institution of the Cause, any owner or part owner of the ship is domiciled in *England* or *Wales*."

The Appellants, the owners of the "*Norway*," intervened, and became the Defendants in the suit.

The suit was founded on a Charter-party and Bills of lading. The Charter-party was executed on the 2nd of *November*, 1861, in *London*, between the Master of the "*Norway*," of the one part, and *W. N. De Mattos* of *London*, of the other part, and was in these terms:—"That the ship being tight, staunch, and strong, and every way fitted, should with all convenient speed be made ready and load at *Liverpool*, a cargo of salt, not exceeding 2,200 tons, and therewith proceed to *Calcutta*, and after the discharge of the outward cargo reload (or at freighter's option, proceed to *Rangoon*, *Akyab*, or *Bassein*), a full and complete cargo of lawful merchandise, not exceeding what she can reasonably stow and carry, and being so loaded shall therewith proceed to *Cowes*, *Queenstown*, or *Falmouth*, at the Master's option, for orders to proceed to *London*, *Liverpool*, *Bordeaux*, *Havre*, *Antwerp*, or *Marseilles*, or so near thereunto as she may safely get, and deliver the same agreeably to Bills of lading, and so end the voyage (restraints of Princes and rulers, the dangers of the seas and navigation, fire, pirates, and enemies during the voyage always excepted). Ninety days to be allowed the Merchant (if the ship be not sooner dispatched,) for discharging the outward cargo of salt and loading at *Calcutta*, or the rice ports, and the vessel to be unloaded at port of dis-

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charge according to the custom of the port, the freighter having the option of keeping the vessel on demurrage to the extent of ten days over and above the laying days if so required. In consideration whereof and everything before mentioned the freighter hereby promised and agreed to load and receive, or cause to be laden and received, in the manner and within the time therein mentioned for these purposes, and pay or cause to be paid as freight for the use and hire of the vessel, £11,250, lump sum, if ordered, to the *United Kingdom, Havre, or Bordeaux*, £11,250, if ordered to *Antwerp or Marseilles*, the Master guaranteeing to carry 3,000 tons dead weight of cargo upon a draught of 26 feet of water, or to forfeit freight in proportion to deficiency. The vessel to be loaded at port of lading to such a draught of water as the freighter or his agents may in connexion with the Pilot Commissioners consider safe to proceed to sea, lighterage, if any, to fill up the ship below the flats to be at freighter's expense, payment whereof to become due and to be paid as follows, viz.: £2,000, to be advanced on the vessel clearing at *Liverpool* subject to insurance only, say £1,000 by freighter's acceptance at four months, and £1,000 at six months, sufficient cash for ship's disbursements, not exceeding £2,500, to be advanced at *Calcutta*, and the necessary disbursements, if ordered to the rice ports, subject to interest and insurance only, all at current rate of exchange, for six months' Bills on London against the Captain's receipts. Such advances to be made on account of chartered freight and the balance as follows, viz., one-third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the port of discharge by good and ap-

proved Bills payable in *London*, or cash equal to three months' date from the delivery, if discharged in the *United Kingdom*, or in cash at current rate of exchange if discharged on the Continent, less three months' interest. The vessel, if ordered from *Calcutta* to load at the rice ports, to proceed within forty-eight hours, wind and weather permitting, after receiving her despatches to sail. The customary port charges and towage at the rice ports to be borne by the freighter, as well as the actual cost of ballasting required for the ship at *Calcutta*. The cargo to be brought to and taken from alongside at the Merchant's risk and expense. The vessel to be addressed at all ports to freighter's agent, paying one commission only on the Charter, not exceeding five per cent."

It appeared from the petition that subsequent to the making of the Charter-party, it was agreed between *De Mattos*, the Charterer, and the firm of *Ashburner & Co.*, of *Calcutta*, that the homeward shipment on board the "*Norway*," under Charter, should be on joint account, each a moiety, the firm of *Ashburner & Co.* to purchase the cargo, and manage the matter of the shipment. That in pursuance of the Charter-party the "*Norway*" proceeded to *Calcutta* and discharged her outward cargo there; and that by an arrangement on her arrival there she went to *Bombay*, and thence in ballast to *Rangoon*, to load rice, in pursuance of the Charter-party, where having taken a certain quantity of rice on board, in the anchorage off *Rangoon*, she proceeded below the *Hastings Sand*, which lies a few miles lower down the river than *Rangoon*, and there took on board a further quantity of rice, making a total of 36,200 bags; in respect of which, being in four separate parcels, the Master of the "*Norway*"

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signed four sets of Bills of lading for 13,000 bags, dated respectively the 10th of *March*, 1863, each of which was in the following form:—"Shipped, in good order and well conditioned, by the *Burmah Company* (Limited), in and upon the good ship called the '*Norway*,' whereof is Master for this present voyage, *H. B. Major*, and now riding at anchor in the *Rangoon* river, and bound for *Cowes*, *Queenstown*, or *Falmouth*, for orders, as per Charter-party, 13,000 bags of cargo rice, being marked and numbered as in the margin, are to be delivered in the like good order and well conditioned, at the port of discharge, the act of God, the Queen's enemies, fire, and all and every other danger and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted, are to order or to assign freight for the said goods payable as per charter-party, with primage and average accustomed. In witness whereof the Master or purser of the ship hath affirmed to three Bills of lading, of all this term and date, the one of which three bills being accomplished, the other two to stand void."

The 36,200 bags of rice were in dead weight short of the 3,000 tons mentioned in the Charter-party, and the "*Norway*," so loaded, drew less than 26 feet of water, and proceeded on her voyage to Europe, with the 36,200 bags of rice on board. It was proved that at the time of the loading of the "*Norway*" at *Rangoon*, the Managers of the *Burmah Company*, who were the Agents of the Respondent, referred the Master of the "*Norway*" to *A. Brooking*, who was the person who answered the description of Pilot Commissioner in the Charter-party, in order that he might report up to what draught

the "*Norway*" could be safely loaded at the port of *Rangoon*, and who reported that he considered a vessel of so large a size, 2,078 tons, could not at that season proceed down the river with prudence and safety, and should not load beyond 25 feet; whereupon the "*Norway*" was loaded to that draught, the cargo consisting in dead weight of 2,715 tons, with about 25 tons of dunnage.

Having completed her loading, the "*Norway*" left her anchorage below *Hastings Sands*, in the port of *Rangoon*, and proceeded down the *Irrawaddy*, with the assistance of a steam tug, hired by the *Burmah Company*, as agents of *Ashburner & Co.*, both the tug and the ship being under the charge of a Pilot, who was selected by the Superintendent of Pilots at the port of *Rangoon*. The current of the *Irrawaddy* is one of unusual force. In consequence of the difficulty of the navigation, the tug, which was scarcely powerful enough to hold the "*Norway*" against the strong current, was, under the orders of the Pilot, made to back down the river, for the purpose of guiding and canting the ship, and of assisting her in keeping safely in the channel of the river; whilst the "*Norway*," under the charge of the Pilot, was made to drop down the river stern foremost. In this manner the "*Norway*" proceeded to descend the river during a period of three days, anchoring always at night, and also in the day-time during the flood, and dropping down during the ebb, the ship and the tug being always under the charge of the Pilot, whose orders were duly obeyed, and were not interfered with by the Master of the "*Norway*."

Whilst the ship was proceeding to sea, and near the

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mouth of the river, the "*Norway*" took the ground, but was after some time got off, and anchored in the mouth of the river. On the accident being communicated to the *Burmah* Company, they sent a mail steamer to the assistance of the "*Norway*," and the steamer took the ship through the mouth of the river out to sea, and then left her. After the "*Norway*," had been some days at sea, the vessel sprang a leak, and it became necessary for the safety of the ship, the cargo, and crew, to lighten her, by jettisoning about 500 bags of rice. The leak continued to increase, and it eventually became necessary to put into *Port Louis*, in the *Mauritius*, and there to discharge the cargo and to repair; and in order to defray the expenses thereby incurred, the Master of the "*Norway*," who was without means or credit, was compelled to execute a Bottomry bond, by hypothecating the ship, cargo, and freight. Shortly before reloading the cargo, a portion thereof, namely, 1,360 bags of rice, was found so much damaged by sea water, that it became necessary to sell them at *Port Louis*.

The "*Norway*" arrived at *Falmouth*, one of the ports mentioned in the Charter-party, on the 10th of *November*, and on the 13th of that month, *De Mattos*, the Charterer, gave orders to the Master to proceed to *Liverpool*, there to discharge in either the *Albert*, *Stanley*, or *Wapping* Dock; the cargo to be addressed at *Liverpool* to the firm of *Bushby & Co*. On the arrival of the ship in the *Mersey*, off *Liverpool*, the Master was of opinion that she could not be docked in either the *Albert*, *Stanley*, or *Wapping* Dock, without being previously lightened of her cargo, on account of there not being sufficient water in either of those docks; he, therefore, proposed to Messrs. *Bushby & Co*. to

lighten the ship in the river, if they would pay the expenses, to enable her to go into one of those docks. They however declined altogether to act as the ship's agents, whereupon the Master took her into the *Canada Dock*, which adjoined the *Stanley Dock*, and where there was sufficient water to admit the "*Norway*" with her whole cargo.

The Master insisted on payment of the full freight before delivery of any part of the cargo, claiming £6,500, as freight, and a further sum of £1,000, by way of general average contribution. This the Respondent declined to accede to, on the ground of the demand being excessive, but offered to pay into the hands of a third party the full amount in dispute to await the final result, which offer the Master declined, and refused to deliver up the cargo on any other terms, and having taken up the Bottomry bond on the 8th of *December*, 1863, made entry of the cargo in his own name, under the provisions of the Merchant Shipping Amendment Act of 1862 (25th & 26th *Vict.* c. 63, sec. 67). On the same day *De Mattos* stopped payment. Various interviews and letters relating to the delivery of the cargo passed between the Agents for the cargo and the Brokers acting for the ship, and the Respondent's Solicitors and the Solicitor for the Master, the final result of which was that the Master waived any tender on the part of the Respondent of any sum of money short of the sum of £7,500, and the actual production of the Bills of lading, and insisted on the payment of that sum as a condition precedent to the delivery of any part of the cargo; and proceeded to discharge the cargo in the *Canada Dock*, which was an open dock, though furnished with sheds, contrary, as was insisted by the Respondent, to the provisions of the 67th

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section of the Merchant Shipping Act, 1862, and to the damage of the rice. In consequence, the Respondent instituted the present suit, pleading the above facts, and contending that the Master of the "*Norway*" had committed breaches of duty and breaches of contract, for which the ship and freight were responsible under the provisions of the Admiralty Court Act, 1861; in respect of the throwing overboard, and selling part of the Respondent's cargo on the voyage; in refusing to discharge in either of the docks directed by the Charterer; in not unloading at *Liverpool*, the port of discharge, according to the custom of the port; and in placing the rice on and in wharfs and warehouses, in which such goods were not usually placed, thereby violating the requirements of the Merchant Shipping Amendment Act, 1862; in wrongfully claiming for freight and general contribution, a larger sum than was due, and in wrongfully detaining the cargo by way of lien for such excessive sum; in withholding particulars of the weight of the cargo shipped, of the jettison and sale of part cargo, and other matters necessary for the right calculation of the amount of freight and general average; in not delivering the rice according to the contract contained in the Bills of lading, and in breaking such contract.

With regard to the evidence taken, the learned Judge of the Court below, the Right Hon. Dr. *Lushington*, found the following facts proved—regarding the relation of *De Mattos* and *Ashburner*, that the agreement had been, that the homeward shipment should be on the joint account of *De Mattos* and the firm of *Ashburner & Co.*, each having a moiety, the firm of *Ashburner & Co.* to purchase the

cargo, and to manage the matter of the shipment ; that the cargo was shipped at *Rangoon*, by the *Burmah* Company, on behalf of *Ashburner & Co.*, and the Bills of lading were indorsed by the *Burmah* Company and their Agent to *Ashburner & Co.*, at *Calcutta* ; that *Ashburner & Co.* drew Bills upon *De Mattos* for the whole amount of the purchase money, and sent these Bills and also the Bills of lading to the Union Bank in *England*, with instructions to the effect, that *De Mattos* would accept the Bills of Exchange, and, when the time was due, pay their amount into the bank to the credit of *Ashburner & Co.* ; that when this was paid, and not before, the Bank was to hand over the Bills of lading to *De Mattos*. That the Bank had a lien upon the Bills of lading, to secure the current account of *Ashburner & Co.* That *De Mattos* accepted the Bills, but the delay of the vessel at the *Mauritius*, which prevented her from arriving before the Bills became due, caused him to make new arrangements with *Ashburner*, to the effect that *Ashburner* should withdraw the Bills from circulation, at a cost of about £3,500, and that he should have an assignment from *De Mattos* of his moiety of the cargo upon trust, to appropriate the proceeds as follows : — first, to satisfy one-half of the price of the cargo ; secondly, to reimburse himself the £3,500 ; thirdly, to apply the remainder towards paying off the debt (then amounting to £13,000) due from *De Mattos* to the Plaintiff, previously upon their general account. That on the arrival of the vessel at *Liverpool*, the Union Bank gave up the Bills of lading to *De Mattos*, who stopped payment as before stated, pending the negotiations between the Master as to the freight.

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Upon the evidence, the Learned Judge held, that the "*Norway*" was not of sufficient capacity to carry 3,000 tons of cargo upon a draught of 26 feet of water within the meaning of the Charter-party, which included fresh as well as salt water, and that consequently the guarantee was broken and forfeiture of the freight incurred. That the taking the ground by the "*Norway*" was in consequence of the negligence of the Pilot, voluntarily taken on board by the Master, and that the Appellants were liable for such negligence; and further, that taking ground was the original cause of the subsequent leak in the vessel, and of the jettison and sale of the cargo at *Mauritius*, and that, therefore, the Appellants were liable both for jettison and sale of the cargo. That the Respondent was ready and willing to pay the whole of the freight due from him, and that the freight was actually tendered, but that such tender was dispensed with, and that the Respondent could maintain his claim for damages in respect of the detention of the cargo; that the Master of the "*Norway*" was under an obligation to communicate to the Respondent any information necessary for making a valid tender of freight. That material information concerning the ship and cargo was improperly withheld by the Appellants or their Agents. The question respecting the alleged custom of deducting the commission, interest, and insurance from freight, the learned Judge referred to the Registrar and Merchants. He held further, that the Respondent was entitled to make a deduction from the freight, first, on account of the "*Norway*" being unable to carry 3,000 tons dead weight of cargo upon a draught of 26 feet of water; secondly, to a

reduction from the freight in respect of the cargo jettisoned and sold, and thirdly, on account of the rice not having been assorted. And finally the learned Judge decided, that, on the one hand, the Master had a lien upon the cargo for freight and general average (if any). That the freight would be the sum contracted for by the charter-party, namely, £11,251, less the following deductions. First, the advances, secondly, commissions (if any), interest, and insurance; thirdly, the proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draught of vessel; fourthly, the proportion of freight that would have been payable in respect of the goods jettisoned, and the goods sold at *Mauritius*, if these goods had been brought to their destination, and he referred the case to the Registrar and Merchants to take an account thereof, and to ascertain the net freight due, taking into consideration the amount which had been paid on account of freight by the Respondent during the progress of the suit, and the period at which it was paid. He also referred to the Registrar and Merchants to ascertain the amount (if any) due from the owners of the cargo in respect of general average. On the other hand, he held, that the Respondent, under the provisions of the Admiralty Court Act, 1861, was entitled to damages in respect of, first, the goods jettisoned; secondly, the goods sold at the *Mauritius*; thirdly, the non-assortment of the cargo at *Liverpool*; fourthly, the loss of interest occasioned by the wrongful withholding of the cargo; and directed the Registrar, with the assistance of the Merchants, to assess these damages, and having done so, to take an account between the parties, and to ascertain the balance due, and to

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report to the Court, whether any, and if so, what interest was properly due on this balance, and for what period.

The present appeal was from this judgment, and was argued by

Mr. *Brett*, Q.C., and Mr. *Cohen*, for the Appellants, and

Mr. *Lush*, Q.C., and Mr. *V. Lushington*, for the Respondent.

The following points were raised by the argument:

First, the Appellants contended, that, according to the true construction of the charter-party, the guarantee as to the carrying power of the "*Norway*" related to her power to carry 3,000 tons dead weight of cargo, upon a draught of 26 feet of water at sea, *Pust v. Dowie* (a), which, having reference to the ordinary sea-going draught of the vessel, she was of sufficient capacity to do, and that even if the guarantee of the carrying power extended to her carrying 3,000 tons dead weight, upon a draught of 26 feet of water, she was able to carry that weight at *Liverpool*.

Second, with respect to the jettison and sale of the damaged rice, that there was no sufficient evidence to justify the Judge of the Court below holding that the Appellants were liable, in consequence of the negligence of the Pilot in charge. That the taking ground was the cause of the jettison and sale of the damaged portion of the cargo, which were necessary,

(a) 3 B. & S. 20.

being caused by the perils of the sea, for which the insurers of the cargo would be liable, but for which the Appellants were not responsible. *Laurie v. Douglas* (a). *Morewood v. Pollock* (b). *Worms v. Storey* (c). *Lloyd v. The Iron Screw Navigation Company* (d). *Davis v. Garrett* (e). *Siordet v. Hall* (f).

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Third, that the Court below was wrong in holding (1) that the Respondent was ready to pay the whole of the freight due from him ; or that the freight was tendered, or that such tender was dispensed with, or that the Respondent could maintain his claim for damages, in respect of the detention of the cargo ; or (2) that the Master of the "*Norway*" had not a lien on the cargo, *Black v. Rose* (g), *Kirchner v. Venus* (h), nor was under any obligation to communicate to the Respondent any information necessary for making a valid tender of freight, and (3) that material information concerning the ship and cargo was improperly withheld by the Appellants or their Agents.

Fourth, as regarded the alleged custom of deducting freight, that no special custom or binding usage was established, nothing more being proved than that it was the usual mode of settling freight in ordinary cases, and that such a custom, even if it had been proved, was unreasonable, inasmuch as the freighter's Agent refused to accept and take charge of the cargo.

Fifth, that with respect to the non-assortment of

(a) 15 Mee. & Wels. 746.

(b) 1 Ell. & Bla. 744.

(c) 11 Exch. 427.

(d) 33 L. J. Exch. 269.

(e) 4 M. & P. 540.

(f) 4 Bing. 607.

(g) 2 Moore's P. C. Cases, N. S. 277.

(h) 12 Moore's P. C. Cases, 361.

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the cargo, the Appellants, as shipowners, were not liable for the act of the Master porter; as the duties of the Master of the "*Norway*," with respect to the cargo, were at an end when the cargo was delivered into his hands. That under the Merchant Shipping Amendment Act, sec. 67, par. 6; *Mersey Docks Consol. Act*, 1858, sec. 35, the cargo need not be assorted, unless the consignee entered the cargo in his own name, and that there was nothing to have prevented the Respondent from so doing, whether there was or not an excessive demand for freight and general average, and, therefore, that the non-assortment was the default of the Respondent.

Lastly, that the suit was vexatiously and unnecessarily instituted, as, under the provisions of the Merchant Shipping Act Amendment Act, 1862, (25th & 26th *Vict.*) c. 63, sec. 70, the Respondent might have obtained possession of the cargo.

20th July,  
 1865.

The consideration of their Lordships' judgment was reserved, and now delivered by

The Lord Justice Knight BRUCE.

This is an appeal from a judgment of the High Court of Admiralty, in a suit instituted under the 6th section of the Admiralty Court Act, 1861 (24th *Vict.*, c. 10). The Plaintiff sued, under this section, as the Assignee of Bills of lading.

The Defendants are the owners of the "*Norway*," an American vessel; and Plaintiff's petition complained (*inter alia*) that the Master of the "*Norway*" wrongfully threw overboard part of the rice comprised in the Bills of lading, and wrongfully sold :

further part of the rice at the *Mauritius*. And, further, that on the arrival of the ship at *Liverpool*, the Master wrongfully demanded to be paid £6,500, as freight, and an additional sum of £1,000, by way of general average contribution, as a condition precedent to the delivery of any part of the cargo, and refused to deliver the cargo on any other terms. The petition contains other complaints as to the Master of the "*Norway*" refusing to discharge at the docks at which he was directed to discharge, and also as to improperly dealing with the cargo in other respects after arrival in *Liverpool*. But it is unnecessary to do more than state that the petition contained such complaints; because the Judge of the Admiralty Court decided that they were ill-founded, and the Plaintiff has not appealed from that decision.

The Defendants' answer denies many of the allegations of the petition, and justifies the jettison and sale of portions of the rice on the ground that it became, by reason of the perils of the seas, necessary and proper for the preservation of the ship and cargo to throw part of the rice overboard, and to sell another part which had been greatly damaged by salt water. To this part of the answer, the Plaintiff replies merely by denying the averments contained in it. The answer concludes by praying, that the Judge will dismiss the petition with costs, and will decree that the Plaintiff should pay to the Defendants the balance of freight and general average due to the Defendants, and interest thereon.

The learned Judge below, in a most elaborate, lucid, and able judgment, has gone through all the points arising in the cause which ought to decide the

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claims of the parties. And we think we cannot do better than to follow his judgment, and state in what respects we agree with and in what respects we differ from him.

The first question is, what is the meaning of a guarantee, in the charter-party, that the vessel shall carry 3,000 tons dead weight upon a draught of 26 feet water? And the materiality of this question arises from this, that she could carry the specified quantity on the specified draught in salt water, and could not in fresh. Does the guarantee then apply to salt water only, or to fresh water as well as salt? We think it applies to fresh water as well as salt. We think the learned Judge below was right in inferring from the charter-party, that, in settling, the stipulations as to the capacity and draught of the ship, both parties contemplated that the cargo might be loaded in a river, and that the guarantee means, that the vessel should be capable of carrying 3,000 tons on a draught of 26 feet during the whole time of taking in, and until and after she reached the open sea.

The next question is, whether the jettison of a portion of the cargo, and the sale of the damaged portion of it, have been sufficiently shown to have been the consequence, legally speaking, of negligence or want of skill on the part of the Pilot, for which the ship-owner is responsible. It was objected, on the part of the Defendants, that even supposing that the grounding of the "*Norway*" was properly attributable to the misconduct of the Pilot, yet that the injury thereby sustained by the vessel was not either the *causa proxima* or *causa causans* of the jettison or sale, inasmuch as it appears that the leak thereby

occasioned would not, in fact, have rendered the ship unworthy, but for the tempestuous weather which occurred some time after the "*Norway*" had proceeded on her voyage, and, moreover, that the damage to the rice sold, which necessitated the sale of it, would not have happened but for an accident to the steam-engine, which rendered it useless in working the pumps. It is, however, unnecessary, in the view we take of the case, to express any opinion as to this contention, because we have come to the conclusion that there was not sufficient evidence that the grounding of the vessel was occasioned by any misconduct on the part of the Pilot. The evidence on which the learned Judge in the Court of Admiralty relied, as leading to the conclusion that the grounding was caused by negligence or want of skill in the Pilot, is merely, or mainly, the expression of the opinions of the witnesses, Captain *Ward*, Captain *Dicey*, and Mr. *Duncan*, that a Pilot of ordinary skill and ordinary prudence might have safely navigated such a vessel to the sea. This testimony does not go further, in our opinion, than to show a reasonable possibility that the grounding may have been caused by want of skill or want of prudence on the part of the Pilot. But there is no evidence given, and no suggestion made, of any conduct of the Pilot which amounted to such want of skill or of care. The ship was of large size, and loaded as heavily as she could bear. It was necessary, under the circumstances, to let her drop down the river stern foremost, and a steamer of 60 horse power, which was not powerful enough to tow her down, was made fast to her alongside, for the purpose of sheering or canting her so as to keep her in the stream, and the

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grounding took place while the steamer was thus employed. The Master and the Mate were not asked whether there was any impropriety in thus navigating her. The witnesses on both sides agree that the tide ran very strong (although there is a conflict of testimony as to the amount of its velocity). No suggestion is made on the cross-examination of the Master or the Mate of anything done or omitted by the Pilot which he ought not to have done or omitted, and the Master swears that the steamer could not hold the ship against such a current, and that the navigation appeared to him very difficult in that current with so large a ship. And it seems to us impossible to affirm, with reasonable certainty, that such a vessel so navigated might not have grounded from some cause which reasonable skill and prudence on the part of the Pilot could not prevent. The Plaintiff was bound to prove affirmatively, and not merely by way of conjecture, that the vessel grounded by reason of the Pilot's want of skill or want of care, and we can find no such proof in the evidence he has adduced. It may be added, that the silence of the petition as to any imputed negligence, affords some ground for the Defendants' complaint, that this imputation took them by surprise, so that they were not prepared with the evidence of the Pilot.

The next question is whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned Judge below, because it was then taken for granted that

the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the Master. But, in the view we take of this part of the case, it must be understood that they were owing to the perils of the sea, and that the Master was free from blame in the matter. Although the lump sum is called "freight" in the charter-party and Bills of lading, yet we think it is not properly so called, but that it is more properly a sum, in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of £11,250 is to be paid as freight for the "use and hire of the ship," and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt, and received the rice on board, and performed her homeward voyage according to her engagement, and the event, that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold, ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected, on behalf of the Respondent, that, by the charter-party, the remainder of the lump sum is made payable only on "true and final delivery of the cargo at the said port of discharge." But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge. And it should be observed, that the "one-third in

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cash" is made payable "on arrival at the port of delivery," without any reference to the cargo the ship shall bring with her. It is right to add, that we do not mean to express an opinion that, even if the jettison and sale had been attributable to the negligence of the Master, there ought to have been a deduction. Perhaps, in this case, the proper remedy of the shipper would have been by a cross action. But it is not necessary to decide this point, which does not now arise.

The next question is, whether the Plaintiff has a well-founded claim for damages against the Defendants for the non-delivery of the cargo; and this depends on the question whether the Plaintiff was excused, by the conduct of the Master, from making a tender of the freight for which the cargo was liable.

We have felt considerable difficulty on this part of the case. It is clear that the Master claimed more than was due to him. But it was conceded that this alone would not dispense with the tender. If, however, the demand of the larger sum was so made that it amounted to an announcement by the Master that it was useless to tender any smaller sum, for that, if tendered, it would be refused, that would amount to a dispensation with any tender, generally speaking. And in the present case, the Judge of the Court of Admiralty having come to the conclusion of fact, that the demand was made under such circumstances, that it did amount to such an announcement, we see no reason for dissenting from the conclusion he has so drawn. But our difficulty is, that in this case there is positive evidence, in our opinion, that the Plaintiff had resolved not to tender the amount unquestionably due; for his proposal was

to pay a certain amount of the freight claimed, and to deposit the residue with a Banker, as being a disputed portion. Now, this residue was an amount to cover the whole of the alleged short delivery of 300 tons at *Rangoon*, where 2,700 tons had been shipped instead of 3,000 tons; whereas, the learned Judge below was of opinion that the Plaintiff had no claim for deduction in respect of even so much as 100 tons, and against this part of the judgment there is no appeal. Consequently, it appears that the Plaintiff meant that his tender of money to the Master should not cover a portion of the claim which has turned out to be due.

However, we are not prepared to hold that this varies the ordinary rule which we have stated, as to dispensing with the tender altogether, by announcing that it will be useless to tender anything less than the wrongfully large amount insisted on.

That the sum insisted upon in this case was wrongfully large, we think is plain; for without entering into the question, whether the Defendant was wrong in claiming the full lump sum, the claim of £1,000 for general average was altogether unfounded, as will appear when the estimate on which this claim is based is narrowly examined.

The amounts which, according to the Master's estimate, formed the subject of general average, were—

|                                      |   |   |         |
|--------------------------------------|---|---|---------|
| For expenses incurred by him at the  |   |   |         |
| <i>Mauritius</i>                     | . | . | £1,530  |
| For loss on the cargo jettisoned and |   |   |         |
| sold                                 | . | . | 1,200   |
| <hr/>                                |   |   |         |
| Making a total loss, as the subject  |   |   |         |
| general average of                   | . | . | £2,730. |

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This amount had, consequently, to be apportioned between the ship, freight, and cargo.

Then the Master values the ship at £10,000, and the freight he takes at £7,000 then due.

The cargo he estimates at £10,000, which seems reasonable, for although the cargo sold for £20,000, yet deducting the freight and the landing charges and assorting charges, &c., the balance would probably not be much more than £10,000.

Assuming, therefore, the values to be correct, there is a total of £27,000, on which has to be apportioned the total of the losses, forming the subject of general average, viz., £2,730.

By the rule of three, this will give the proportions payable by the ship, freight, and cargo, as follows:—

|         |   |   |   |   |         |
|---------|---|---|---|---|---------|
| Ship    | . | . | . | . | £1,011  |
| Freight | . | . | . | . | 708     |
| Cargo   | . | . | . | . | 1,011   |
|         |   |   |   |   | <hr/>   |
| Total   | . | . | . | . | £2,730. |

In other words, the owner of the ship, who is also the owner of the freight, has to pay as his proportion towards general average:—

|              |   |   |   |         |
|--------------|---|---|---|---------|
| For the ship | . | . | . | £1,011  |
| „ freight    | . | . | . | 708     |
|              |   |   |   | <hr/>   |
|              |   |   |   | £1,719. |

But his losses, which form the subject of general average, are only £1,530, so that the amount payable by the owner of the ship and freight as his contribution to general average, is the difference between the two sums, or £189. On the other hand, the owner of the cargo has to pay as his proportion £1,011, but his losses have been £1,200, so that he

has to receive £189, to make up the losses on account of general average sustained by him.

The general average account would then be balanced by the owner of the ship paying to the owner of the cargo the sum of £189. If this be so, then, upon the Master's own estimate of general average, there was nothing due to him by the owner of the cargo on account of general average; but, on the contrary, he owed the owner of the cargo a sum of £189 on this account.

Being, then, of opinion that the peremptory claim for general average brings the case within the rule as to dispensation with the tender, it is unnecessary to consider the other ground on which the Judge of the Court below came to the conclusion that the conduct of the Master had exempted the Plaintiff from the obligation of making a tender.

It remains to be considered whether the Plaintiff has a right to deduct "address commission" from the freight. The contest in the Court below appears to have been confined to the question whether, by custom, the holder of a Bill of lading comprising the whole of the cargo has a right to deduct the address commission from the freight, and the learned Judge referred this question to the Registrar and Merchants. But, in the argument before us, the contention was that, assuming the custom to be so, the address commission was never earned, inasmuch as *Bushby & Co.*, to whom the ship was addressed as the Agents of the shipper, refused to accept the ship as Agents, and never acted for the ship at all; but that *Taylor & Co.* acted as Agents of the ship for the Defendants who will have to pay them for so doing. Under these circumstances, we think the reference to the

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Registrar and Merchants ought to be enlarged by leaving it to them to inquire whether the Plaintiff, by his Agents, so acted on the ship's behalf as to entitle him to the address commission.

The last question to be considered is whether the claim for damages for non-assortment can be supported.

An objection to this claim was taken on behalf of the Appellants, that there is no mention of it in the petition. The answer made to this objection is that this cause of complaint did not arise till after the petition was filed—an answer by no means satisfactory.

But upon the merits of this question we think the Plaintiff fails. We do not understand why he did not avail himself of the power conferred by the Statute, 25th & 26th *Vict.*, c. 63, s. 67, to enter and land the goods himself. If he does not, but allows the Master to do so, is the Master bound to take steps to have the goods assorted, if the owner of the goods requires him so to do? If the Master were to give orders for it, he would, we apprehend, render himself liable for the expenses of the assortment. No doubt the law is that such a bailee is bound to take as good care of the cargo as a prudent owner would have taken; but we have never heard of any case where the bailee was held to be bound to incur a pecuniary liability to procure an advantage for the subject of the bailment. His duty, we think, does not go beyond safe custody and protection from injury or damage.

We, therefore, think that this claim cannot be sustained.

According to our opinions on the various points

arising in this case, the freight due to the owners of the "*Norway*" is the sum contracted for by the charter less the following deductions :—

First, the advances ;

Second, address commission (if found in favour of the Plaintiff by the Registrar and Merchants) ;

Third, the proportion of freight forfeited for breach of the guarantee in the Charter-party as to the capacity and draught of the vessel.

It should then be referred to the Registrar and Merchants to take an account and ascertain the nett payment due on the principles we have stated, taking into account the amount which has been paid on account of freight, by the Plaintiff during the progress of the cause.

On the other hand, in our opinion, the Plaintiff, under the provisions of the Admiralty Court Act, 1861, is entitled to be indemnified for the loss of interest in respect of the wrongful withholding of the cargo, and to the claim for insurance and interest, but to nothing more.

Therefore, the Registrar, with the assistance of the Merchants, will have to ascertain the balance due, and to report to the Court whether any interest, and if so what, is properly due on such balance ; and we shall humbly recommend Her Majesty that judgment should be given for the balance and interest thus ascertained ; and that there shall be no costs on either side, either in the Court of Admiralty or here.

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# ON APPEAL FROM THE SUPREME COURT AT MAURITIUS.

THE PENINSULAR AND ORIENTAL } *Appellants;*  
STEAM NAVIGATION COMPANY }

AND

THE HON. FARQUHAR SHAND . . . *Respondent.\**

22nd & 23rd  
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The rule governing the interpretation of a contract made in one country to be performed wholly or partly in another country,

is, that the law of the country where the contract is made governs as to the nature of the obligation, and the interpretation of it, if the parties to the contract are (1) either subjects of a power there ruling, or (2) as temporary residents owe that power a temporary allegiance. In either case they must be understood to submit to the law there prevailing, and to agree to its action on their contract.

It is immaterial that such agreement so to be ruled by the *lex loci contractus* is not so expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a Foreign Court interpreting or enforcing a contract so made on any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognized comity of nations.

A passenger by an English vessel belonging to an English Company from *Southampton* to *Mauritius* *via Alexandria* and *Suez*, took and signed a ticket, in the body of which the engagement of the Company was stated to be subject to the conditions and regulations endorsed thereon; among which was this clause—"the Company do not hold themselves liable for damage to, or loss, or detention of passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the Company in the Supreme Court at *Mauritius* for damages for the loss. That Court held that the contract was governed by the French law in force in *Mauritius*, and held that the Company were liable. Upon appeal held (reversing that judgment):—

THIS was an action brought by the Respondent in the Supreme Court at *Mauritius* against the Appellants for damages for the non-delivery by them at *Mauritius* of certain articles of baggage.

\* Present:—The Lord Justice Knight Bruce, the Lord Justice Turner, and Sir John Taylor Coleridge.

The plaint, in substance, stated, that the Appellants, being common carriers of goods for hire from *Southampton* to the *Mauritius*, the Respondent and his family became passengers from *Southampton* to *Mauritius*, together with their baggage, and that the Respondent delivered to the Appellants, who received the same from the Respondent, a certain bale or package, consisting of articles belonging to the Respondent—viz., great coats, plaids, cloaks, shawls, and similar articles—well and firmly put up and bound together in one package, and legibly and properly addressed with the name of the Respondent as passenger to *Mauritius* aforesaid, and to be safely conveyed by the Appellants from *Southampton* to *Mauritius*, and to be delivered there to the Respondent; yet the Appellants, not regarding their duty as common carriers, did not safely carry the package from *Southampton* to *Mauritius*, nor deliver the same to the Respondent; but, on the contrary, so negligently and carelessly conducted themselves, that by their negligence, carelessness, and default, the package or bale and its contents were wholly lost to the Respondent, who thereby sustained damages to the amount of ninety pounds sterling.

The Appellants appeared to the action and generally disputed their liability. No other pleadings was had on either side.

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First, that it was a contract to be interpreted by the law of *England*, the place where the contract was made.

Secondly, that (as neither the Carriers' Act, 11th *Geo.* IV. & 1 *Will.* IV. c. 68, or the Railway and Canal Act, 17th & 18th *Vict.* c. 81, applied) the Company, as carriers, at Common Law, had power to limit their Common law liability by special agreement, and that the limitation imposed by the stipulations endorsed on the ticket with respect to any loss, exempted the Company from responsibility for the loss of the baggage.

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The action was tried in the Bail Court of the Island of *Mauritius*, a branch of the Supreme Court, before the Hon. Mr. Justice *Bestel*.

The facts as they appeared in evidence, about which there was no controversy, were as follows :— The Appellants, the Peninsular and Oriental Steam Navigation Company, were an Incorporated Company for carriage of passengers and their baggage and also merchandise to and from *England* and *India*, *Australia* and *China*, and the adjacent parts, including the Island of *Mauritius*, having their head-quarters, or place of business in *London*. The course of the entire passage to *Mauritius* was, that passengers embark at *Southampton* with their baggage upon one of the Company's steam-ships, and proceed therein to *Alexandria*; there they disembark, and proceed by Railway across the desert to *Suez*, from which place they proceed in a small steam-boat to join and embark on another of the Company's steam-ships waiting for them in the Red Sea, and in which they proceed to their destination. In the passage from *Suez* to the steam-ship, the baggage was conveyed in a separate boat from the passengers.

In the month of *October*, 1860, the Respondent having been appointed Chief Judge at *Mauritius*, took a passage at *Southampton* by the Company's ordinary line for himself and family from *Southampton* to *Mauritius*, and embarked on board the Company's steam-ship "*Ceylon*," for *Alexandria*, taking with him a quantity of baggage, consisting of twenty-one packages, and for which the Respondent paid according to the rate ordinarily charged to passengers. Amongst this baggage was a certain package containing cloaks, shawls, and other personal luggage, the loss of which

was the subject of the action. Upon taking his passage, the Respondent signed the ticket ordinarily issued to passengers by the Company, having certain conditions and regulations endorsed thereon, amongst which was the following clause:—"The insurance of baggage can be effected on moderate terms. Notice.—All parties are requested to take notice that the Company do not hold themselves liable for detention or delay of passengers, arising from accident or from extraordinary or unavoidable circumstances, or from circumstances arising out of or connected with the employment of the Company's vessels in Her Majesty's Mail Service; and that the Company do not hold themselves liable for damage to or loss or detention of passengers' baggage, or for any consequences arising from the restrictions of quarantine wheresoever imposed."

The Respondent and his family proceeded in the "*Ceylon*" to *Alexandria*, where they disembarked, and were conveyed by the Railway through *Egypt* to *Suez* in the ordinary course, and there embarked on board a small steamer belonging to the Company to join the Company's steamer the "*Norna*," in which they proceeded to *Mauritius*. The Company's servants took possession of the baggage during the land transit from *Alexandria* to *Suez*. The package was last seen by the Respondent's servant on board the small steamer in which they were conveyed from the Railway at *Suez* to the steamer "*Norna*;" it was then in charge of the Company's servants. The Respondent's servant wanted to have the keeping of the package, but the Company's servants refused to allow it. Upon the arrival of the "*Norna*" at *Mauritius* the package was missing, and was lost. No evi-

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dence was given of negligence on the part of the Company or any of their servants beyond what might be implied from the fact of the loss.

Upon these facts it was insisted in the Court below by the Respondent that the Appellants, as common carriers, were responsible for the loss of the goods; that the contract began only in *England* and ended in *Mauritius*, and, consequently, was to be governed by the French law in force at *Mauritius*; and that, according to that law, the clause of the ticket qualifying the general Common law liability of the Appellants, as common carriers, was void, as being against the policy of the law, *Code de Commerce*, Art. 113; and it was further argued for the Respondent, that the contract, as to its validity, nature, obligation, and interpretation, was to be governed by the law of the place of performance, viz., by the law of *Mauritius*. *Story's Conf. of Laws*, s. 283, p. 375 [Ed. 1841]. That the law of that Island rendered a Carrier by land, or by water, liable, except in case of *force majeure*, Arts. 98 & 103, *Code de Commerce*, and Arts. 1,788 & 1,784, *Code Civil*, the *onus* of proving which devolved upon the carrier, and without which proof he was necessarily liable to the owner of the goods for the loss thereof, or for damage done to the goods shipped. *Pardessus*, Tom. II., No. 545. That whatsoever might be the legal distinction arising from the insertion in the Bills of Lading in *France* and *England* of certain notices for the purpose either of a party freeing himself from all liability, or of limiting the extent of his responsibility, the ruling of the Courts in England, in presence of such notices, could in nowise affect the decision of the case under the Colonial legal enactments,

the decrees of French Courts and of the concurrence of the French Commentators on the several articles of the Codes above referred to. *Pardessus, Droit Com. Tom. II. No. 542* [Ed. 1825], comments on Art. 1,783 of the *Civil Code*. *Marcade, Explic. Code Napoleon, Tom. VI., p. 532*, and authorities, cited in note I., p. 534. Moreover, that the law having laid it down as a rule that the carrier shall be liable, except in cases of "*force majeure*," the contract between bailor and bailee, releasing the latter from all responsibility on any other ground, was null and void to all intents and purposes, as contrary to the policy of the rule, and, therefore, that the notice on the back of the passage ticket, signed by the Respondent, whereby it was stipulated, that the Company do not hold themselves liable for damage to or loss of passengers' baggage, though thus brought home to Respondent's knowledge, could not relieve the Appellants from their liability.

On behalf of the Appellants it was contended that they were not liable. It was not disputed that the liability of common carriers at Common Law was that stated on the part of the Respondent; but it was insisted, that the special contract placed them in a different position from that of common carriers, and that under it they were not responsible for a loss under the above circumstances, and that this was so according to the law of *Mauritius*; and further that the contract having been entered into in *England*, and by parties both domiciled in *England*, the construction of the contract must be determined according to English Law, and that according to that law, it was quite competent for the Appellants as common carriers to limit their responsibility in the

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manner contended for. *Pardessus*, p. 103, & Arts. 1,133 and 1,134 of the *Code Civil* were cited.

Mr. Justice *Bestel* held that the case was governed by the law in force at *Mauritius*, and gave judgment in favour of the Respondent for £60 damages and costs, upon the following grounds. The point to be examined, he observed, was, whether the Appellants were liable, in spite of the notice given to the Respondent that they did not hold themselves responsible for damages to, or loss, or detention of passengers' baggage, and he referred to Art. 103 of the *Code de Commerce*:—'*Le voiturier est garant de la perte des objets à transporter, hors le cas de la force majeure.*' '*La responsabilité du voiturier cesse et ses obligations sont modifiées par la force majeure, mais il ne suffit pas d'alléguer cette excuse. La présomption est toujours en faveur de la responsabilité, et la force majeure n'est qu'une exception que le voiturier doit prouver.*' *Pardessus*, *Droit Com.* [Ed. 1825], No. 545, p. 590; *Com. on Art.* 1,784, *Code Civil*; Arts. 103, 104, *Code de Commerce*; Art. 1,315, *Civil Code*; and to *Story on Bailments*, [Ed. 1839], s. 528, p. 338. That the reason by the English law was stated by *Holt*, C. J., in *Coggs v. Bernard*, (Lord Ray. 909,) *Smith's Leading Cases*, vol. i., p. 92 [Ed. 1841], 5th note, pages 101, 102. That *Story* in his *Treatise on Bailments*, sec. 549, p. 359, speaking of special contracts between Bailor and bailee, says:—'Still, however, it is to be understood that common carriers cannot, by any special agreement, exempt themselves from all responsibility, so as to evade, altogether, the statutory policy of the Common law, and the Carrier will be equally liable in case of the fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct.'

That an absolute exemption from all responsibility was set up by the Appellants on the strength of an agreement, by the allowance of which, the Court would lend itself to an absolute evasion, not only of the Common Law of *England*, but of the written law of the Island; but that to such an evasion, either absolute or partial, the Court would not lend itself, under any circumstances, and still less in presence of the refusal of the Appellants to allow the Respondent, in person or through his servant, to have the custody of his baggage, and of the missing parcel in particular.

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As the amount of the verdict was under the appealable value, the Company applied, *ex-parte*, to the Judicial Committee, for special leave to appeal.

Mr. *Watkin Williams*, in support of the petition.

Their Lordships in consideration of an important question of law being involved in the case, gave leave to appeal, notwithstanding the amount was under the value prescribed for appealing from the Supreme Court at *Mauritius* to the Queen in Council.

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The appeal now came on for hearing.

Mr. *Mellish*, Q.C., and Mr. *Watkin Williams*, (Mr. *Bovill*, Q.C., with them,) for the Appellants.

Three questions arise. First, what law is to govern the contract; secondly, whether a common carrier may not limit his liability by special contract; and thirdly, whether the loss of the luggage is not

\* Present:—The Lord Justice Knight Bruce, Sir Edward Ryan, and the Lord Justice Turner.

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within the contract for which the Appellants are by the endorsement on the ticket limiting their liability expressly exempted from responsibility.

First, the Court below proceeded on the assumption that the French law which prevails at *Mauritius* was the rule by which the contract in question was to be construed. Our contention is, that both the construction and validity of such contract is to be governed by the law of *England*, the country where it was entered into, both parties to the contract being British subjects. If the law at *Mauritius* is to be held to prevail, then, in effect, every mercantile contract entered into in *England* for the carriage of goods would have to be interpreted by the law of the place of the goods' destination, because the last act of the contract is to be performed there. [Sir *John T. Coleridge*:—Suppose part of the goods are to be delivered in one country and part in another, what law is to prevail?] It would be highly inconvenient if contracts which a Steam Ship Company like the Appellants make at every place where it touches, were to be interpreted by a number of different systems of laws. The rule is truly laid down by *Story*, Conf. of Laws, secs. 270-1, 277, 281,) that where a contract is sought to be enforced its true interpretation must be everywhere the same, that is, according to the law in the country where the contract was made. *Lloyd v. Guibert* (a), a recent case in the Queen's Bench, is decisive on this point. There it was held, that where the Master of a ship contracts as such in a Foreign port to carry goods for a Foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and that the Flag of the ship is notice to all

(a) 33 L. J. Q. B. 241.

the world that his implied authority is limited to the law of that Flag. That case is now pending in error in the Exchequer Chamber (a). The principle we insist upon, that a contract is to be construed by the law of the place where it is made is to be found in *Don v. Lippmann* (c), where the cases are collected, and by the American authorities as to the law of the Flag. *Pope v. Nickerson* (b), *Arayo v. Currell* (d). It is true that Lord Mansfield, in *Robinson v. Bland* (e), which was an action to recover a gaming debt won in France, qualifies this general rule by saying that "the law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Scott v. Pilkington* (f) illustrates this position. Story, Conf. of Laws, sec. 280, puts the exception in another point of view. He there lays it down, that "where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligations, and interpretations, is to be governed by the law of the place of performance;" and he refers to 2 Kent, Comm. Lect. 37, p. 393. This is however laying down a rule in too general terms. A Court in interpreting a contract is really deciding upon a question of fact, namely, the intentions of the parties, and presumes that the parties contemplate the usual mode of executing the contract according to the law of the place it is made at. This is the view taken by the *Cour de Cassation* in

(a) Since reported, Law Rep. 1 Q. B. p. 115, and the judgment of the Court of Queen's Bench affirmed.

(b) 5 Cl. & Fin. 1.

(c) 3 Story's Rep. 465.

(d) 1 Louis. Rep. 528.

(e) 2 Burr. 1078.

(f) 2 B. & S. 11.

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*Julien v. The Peninsular & Oriental Co. (a)*, a case where the facts are on all fours with the present, where that Tribunal held, as we now contend, that the English law governed the contract. A party who contracts to do an act in a Foreign country, which is

(a) The following is the substance of a report of the case of *Julien v. The Peninsular and Oriental Co.*, taken from the *Gazette du Tribunaux*, 6th March, 1864, of the proceedings before the *Cour de Cassation, Paris*, on an appeal from the *Cour Imperiale of Aix*, which Court had affirmed the decision of the *Tribunal de Commerce of Marseilles*.

A French subject, who took a ticket at *Hong Kong* for a passage to *Marseilles* on board the "*Alma*," brought an action for the value of his luggage lost in the wreck of that vessel in the Red Sea. The Company relied upon the ticket as exempting them from liability. The Courts at *Marseilles* and *Aix* held the case governed by the French law, inasmuch as "*les effets des contrats se déterminent d'après les lois du bien d'exécution.*" And it was held further by those Courts, that by the French law, "*Compagnie entrepreneur de transports ne peut pas se décharger de la responsabilité des pertes éprouvées par les fautes de ses employés; en remettant au chargeur de simples bulletins qui mentionneraient l'exonération ou la restriction de cette responsabilité.*" On appeal before the *Cour de Cassation*, President *Troplong* presiding, the Company mainly relied on Art. 1,134 *Code Civil*, "*Les conventions légalement formées tiennent lieu de loi, à ceux qui les ont faites (modus et conventis vincum legum);*" they contended, that the contract was not immoral or illegal, but good by the English law, by which it was insisted it must be governed. The argument for *Julien* admitted the application of the English law, and relied on "*caractère illicite*" of the cause of exemption as "*contraire à la morale publique.*" The case was twice argued. The *Cour de Cassation*, after deliberation, pronounced the following judgment:—"Considering by the terms of Art. 1,134 *Co. Civil*, conventions legally entered into (*formées*) take the place of laws to those who have made them; that in order to decide if a convention has been legally entered into, it must be examined according to the rules of that legislation '*a bannelle sa formion était soumise.*' Considering that *Julien* embarked at *Hong Kong*, an English possession, under a contract with an English Company, that this contract related to English legislation, by virtue of the rule which requires that an instrument should be governed by the law of the

there illegal, is nevertheless liable in this country, if the act be legal here, if he fails to perform his agreement. So in the case of a war intervening between the place of the contract and the place of the performance, it only invalidates the contract when its performance would be illegal by the law of the place where it was made.

Then, secondly, assuming that the contract is governed by the law of *England*, we submit, that the Appellants are not liable, as the baggage was not received or carried by the Appellants as common carriers, but under a special contract, containing reasonable conditions, and, according to the terms and conditions of the contract ticket, the loss of the baggage came within the meaning of the exception, and relieved them from the ordinary liability of common carriers in respect of the goods conveyed by them. This point divides itself into two heads. First, as to the law anterior to the Carriers' Act, 11 *Geo.* IV., & 1st *Will.* IV. c. 68; all the older cases on the Common Law liability of carriers are collected in *Wyld v. Pickford* (a), where it was held, that carriers might relieve themselves from liability for anything but gross negligence. Secondly, the law in 1830, when the Carriers' Act, 11th *Geo.* IV., & 1st *Will.* IV. c. 68, came into operation. Under the 17th & 18th *Vict.* c. 31. sec. 7, and Railway & Canal Traffic Acts, passed in 1854, it has been determined by a series of decisions that Carriers

place where it has been entered into as to its force, its fundamental conditions, and the manner of proving it. Considering that the decree impeached, in estimating according to French law the evidence produced by the Court with a view to establish its exoneration from the damage occasioned to *Julien* by the loss of his luggage, and in proposing to consider the question in the point of view of the English law, has expressly violated Art. 1,184 of the *Code Civil*."

(a) 8 Mee. & Wels. 443.

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may by a special contract stipulate against any liability for loss, providing the condition is just and reasonable. *Shaw v. The York and North Midland Railway (a)*, *Hinton v. Dibbin (b)*, *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Co. (c)*, *Carr v. The Lancashire and Yorkshire Railway Co. (d)*, *Beal v. The South Devon Railway Co. (e)*, *Peek v. The North Staffordshire Railway Co. (f)*, *Wilton v. Royal Atlantic Mail Co. (g)*, *Wise v. The Great Western Railway Co. (h)*. What is laid down in *Story* on Bailments, sec. 549, relied on by the Court below, has really no application to the present case; it was published in *America*, and relates to the law prevailing before the passing of the Carriers' Act, 11th Geo. IV., & 1st Will. IV. c. 68, when that Act has no effect.

Lastly, we submitted that the contract ticket being a special contract, exempted the Appellants in the absence of evidence showing gross negligence. No evidence, in fact, was given of the way in which the loss of luggage happened. So that if the old law prevailed, the Appellants would not be liable, if they had not, as they have here, protected themselves in every way, even to the extent of exemption for liability for gross negligence.

The Lord Advocate (Mr. Moncreiff), Mr. F. Cates, (Mr. Anderson, Q.C., and Mr. Coleridge, Q.C., with them,) for the Respondent.

As the contract between the parties is to be performed at *Mauritius*, the place of delivery of the baggage, it is to be governed, as to its validity, nature, obligations,

(a) 13 Q. B. Rep. 347.

(b) 2 Q. B. Rep. 646.

(c) 16 Q. B. Rep. 600.

(d) 7 Exch. Rep. 707.

(e) 5 H. & N. 875.

(f) 1 El. Bl. & El. 957. S. C. on appeal 10 H. L. Cases, 473.

(g) 10 C. B. Rep. 453.

(h) 1 H. & N. 63.

and interpretation, by the law prevailing and administered there, namely, the *Code Civil* and the *Code de Commerce* of France. The general rule is laid down by *Story*, Conf. of Laws, s. 280, *et seq.*, that a contract is to be interpreted by the law of the place where it is made. That cannot be questioned, and the exception is equally established, that where the contract is to be performed elsewhere, it is to be interpreted by the law of the place of performance. *Don v. Lippmann* (a); *Burge*, Comms. on Col. & For. Laws, Vol. iii. pp. 754-771; who refers to *P. Voet, de Stat.* § 9, c. 2, n. 11; *Robinson v. Bland* (b); *Grell v. Levy* (c). A contract to carry goods is a simple case of contract to be performed elsewhere, namely, the place of the destination of the goods.

Assuming, as the Court below has held, that the French law prevails, by that law a Carrier for hire is an insurer against loss arising from any other cause than *force majeure*, and cannot stipulate that he shall not be liable for the consequences of his own negligence. By that law negligence is presumed against him from the fact of non-delivery. *Code Civil*, Arts. 1,315, 1,782-3-4; *Code de Commerce*, Arts. 79, 98, 101, 103. *Sirey, Les Code Annotes* on Art. 103 of *Code de Commerce*. Nor can by that law a carrier limit his liability by special contract. *Pardessus, Cours de Droit*, Com. 3, 5, 5, Pl. 542, says, "*Le voiturier est responsable des avaries arrivées par sa faute, quand méms il aurait déclaré ne vouloir se charger d'aucune responsabilité.*" *Troplong, Les Droit Civil Explique*, Notes on 1782-3-4, Pl. 916, *et seq.* No. 942. *Chabrot Charman, Dict. de Leg. vo.* "*Voiturier*," Tom. II. p. 1147. *Gouger et Merger, Dict. de Droit Commercial*, Tom. IV., vo. "*Voiturier*," sec. 5, "*Responsabilité du Voiturier.*"

(a) 5 Cl. & Fin. 1.

(b) 2 Barr. 1,077.

(c) 16 C. B. Rep. N.S. 73.

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*Duverger*, "Louage," Tom. II., 325. *Marcardè*, *Explic. Code Nap. "du contrat de louage,"* Tom. VI., p. 532. The Appellants' argument of the inconvenience of such a construction, as we contend for, by instancing the case of delivery at different ports, can have no weight, as contracts are constantly made by them in different ports, to be completed in other places abroad. Although the French case, *Julian v. The Peninsular & Oriental Co.*, relied on by the Appellants, may be an authority on questions of *lex loci*, yet we submit that it does not apply to this case, and, considering that the two inferior Courts took a different view of the law, and the *Cour de Cassation* itself, on the first hearing, divided in opinion, no great weight is to be attached to it as a governing authority. Indeed, the appellate Court seems to have abstained from deciding that by English law a contract "*legalement formée*," and simply decreed on the ground that the English law was not taken into consideration. In point of fact, it is in the Respondent's favour to this extent, as the Courts of *Aix* and *Marseilles* have decided that the contract was invalid by the French law.

But assuming that the contract is to be governed by the English law, and not by the law prevailing at *Mauritius*, the facts proved in evidence are sufficient to establish the Appellants' liability. By the English law a common carrier, in the absence of contract, is obliged, as bailee, to use ordinary care of the goods entrusted to him, and obliged to insure their safety. A carrier in the nature of an insurer, *Forward v. Pillard* (a), *Coggs v. Barnard* (b). This was clear before the passing of the Carriers' Act, 11th Geo. IV. & 1st Will. IV. sec. 68, *Riley v. Horne* (c). *Story*

(a) 1 Term Rep. 27.

(b) Lord Ray, 909. 1 Smith's Leading Cases, p. 183 [5th Ed.]

(c) 5 Bing. 223.

on Bailments, sec. 549; *Philips v. Clark* (a); *Lloyd v. The General Screw Co.* (b); *Peek v. The North Staffordshire Railway Co.* (c); *Beal v. The South Devon Railway Co.* (d). The Carriers' Act of 1830, however, relates exclusively to carriage by land, and the cases relied on by the Appellants therefore do not apply to this case. Again, the immunity of Carriers, under the Railway and Traffic Act, 17th & 18th Vict. c. 31, sec. 7, although it does not apply to sea-traffic, defines the principles which ought to regulate all contracts for carriage. Carriers at sea are common carriers. *Angell on Carriers*, sec. 79. The contract in this case is similar to that in *Peek v. The North Staffordshire Railway Co.* (e), and, as there decided by the House of Lords, must be just and reasonable, which in this case it certainly is not. But the Appellants are compelled to go the length of contending that their notice indemnified them even against gross negligence. That, however, in law, makes no difference, as gross and ordinary negligence are construed to be the same in respect of liability of Carriers. *Story on Bailments*, sec. 11. It was proved that the baggage lost was in the hands of the Appellants' servants, who took it from the Respondent against his wish. The Appellants, therefore, are liable for the loss. The rule is, that if the goods were last seen in the hands of the carrier and are lost, that is *prima facie* evidence of negligence of the Carrier. *Angell on Carriers*, sec. 49; *Reeves v. Palmer* (f); *Byrne v. Boadle* (g); *Scott v. The London Dock Company* (h).

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(a) 2 C. B. Rep. N. S. 156.

(b) 33 L. J. Ex. 269.

(c) 1 El. B. & El. 957.

(d) 5 H. & N. 875.

(e) 10 H. L. Cases, 473.

(f) 5 C. B. Rep. N. S. 84.

(g) 33 L. J. Ex. 13.

(h) 34 L. J. Ex. 17.

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Mr. *Mellish*, Q.C., in reply.

First, the contract is governed by the law of the country in which it is made, and where it could be enforced. Secondly, it is legal certainly since the 17th & 18th *Vict.* c. 31, sec. 7, for the Appellants to make a special contract to limit their liability, as in the case of Telegraph companies and Tug companies, both being protected by Acts of Parliament, and, therefore, the Appellants under the special contract are not liable for the loss of the baggage.

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Their Lordships' judgment was reserved for consideration, and now pronounced by

The Lord Justice TURNER.

This is an appeal against a judgment of the Supreme Court at *Mauritius* in favour of the Respondent, who sued the Appellants for damages occasioned by their non-delivery at *Mauritius* of certain articles of baggage.

The facts of the case appear to be that the Respondent, the Chief Justice of the Court below, intending to proceed to the *Mauritius* with his family, took and paid for a ticket for the passage from *Southampton* to *Alexandria*, and from *Suez* to *Mauritius*, for which he paid one entire sum of £315; in the body of the ticket the engagement of the Appellants was stated to be subject to the conditions and regulations endorsed, and on its face, at the foot of it, the Respondent signed his acceptance in the following form:—"I hereby accept this ticket, subject to the conditions and regulations endorsed thereon."

Numerous regulations both as to the passengers and as to their baggage were endorsed, and at the close of all was a notice commencing thus, "All parties are requested to take notice," and containing among other

things the following clause, "that the Company do not hold themselves liable for damage to or loss or detention of passengers' baggage."

By the ticket it appeared that the voyage from *Southampton* to *Alexandria* was to be on board the "*Ceylon*," and from *Suez* to *Mauritius* on board the "*Norna*;" nothing, however, turns on this nor on the land carriage between *Alexandria* and *Suez*, although in the argument for the Respondent some reliance was placed on the fact that the Appellants during this last transit took exclusive possession and charge of the passengers' baggage, with some trifling exceptions of articles required for immediate personal use. At *Suez*, the "*Norna*" lying a little distance out at sea, in consequence of the shallowness of the water, the passengers were conveyed to her in a small steamboat, the baggage in another vessel. It was on board this small steamer that, according to the evidence, the parcel in question was last seen. It consisted of cloaks, an over-coat, and plaids—articles which probably had been retained for personal use. When last seen, however, it was in the possession and custody of one of the servants of the Appellants. The Respondent's female servant would have herself taken it on board the "*Norna*," but the servant of the Appellants told her not to do so, for that he would take charge of it. Whether it reached the "*Norna*" is uncertain. It was missed by the Respondent when on board that vessel, and on the arrival at *Mauritius* it was not forthcoming.

Upon these facts the Court below held that the law by which the case was to be tried was the French law, which prevails generally at *Mauritius*, and that by that law the Appellants were liable. In the argument before their Lordships the latter proposition was not

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seriously disputed, but it was contended that the Court below should have tried the case by the rules of English law, and that according to those rules the Appellants were protected, under the circumstances of the case, by the terms of their contract with the Respondent. On his part, however, it was argued, that even if the Court below were wrong as to the rule it had governed itself by, yet the judgment was right, even upon the principles of English law. The case was ably and learnedly argued, and a very large number of authorities were cited for the Respondent; the conclusion, however, at which their Lordships have arrived is, that the Appellants are right in both of their propositions, and consequently that the judgment below cannot be supported.

In stating the grounds upon which their Lordships have arrived at this conclusion, it will not be necessary to review or distinguish between all the authorities cited in the argument; every one who is but moderately familiar with the text Books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract made in one country, and to be performed, wholly or partly, in another; but if these be carefully examined, it will be found, after all, that the same general principles have, for the most part, prevailed throughout, and that where the conclusions vary, they do so from distinctions more or less minute in the facts. The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the Power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they

must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties.

This is a contract made between British subjects in *England*, substantially for safe carriage from *Southampton* to *Mauritius*. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in *Mauritius*; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the Appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the Respondent, and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it; or to stipulate for something

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to which, however clearly expressed, the law would allow no validity? This question leaves untouched, it will be observed, the extent of the contemplated protection; it asks, in effect, was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it? or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless attempt to evade a responsibility inseparably fixed upon the Appellants as carriers? The question appears to their Lordships to admit of one answer only; but if they take the Respondent so to have understood the intention of the Appellants, they must take him to have adopted the same intention; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different on so important an article; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood.

The actual intention of the parties, therefore, must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and as there is no rule of general law or policy setting up a contrary presumption, their Lordships will hold that the Court below was wrong in not governing itself according to those rules.

It is a satisfaction to their Lordships to find that in the year 1864 the *Cour de Cassation* in France pronounced a judgment to the same effect in a case under precisely the same circumstances, which arose between the Appellants and a French officer who

was returning with his baggage from *Hong Kong* in one of their ships, the "*Alma*," and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior Courts, those of *Marseilles* and *Aix*, decided it in favour of the Plaintiff on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at *Hong Kong*, an English possession, and with an English Company, was to receive its interpretation and effect according to English law

Still, as has been already intimated, there remains the question what, according to English law, is the extent of the limitation imposed by the stipulation in the ticket on the responsibility of the Appellants? This is next to be considered: the case depends on the Common Law; it is not within either the Carriers' Act of the 11th *Geo. IV.*, & 1st *Will. IV.* c. 68, or the Railway and Canal Traffic Act, 17th & 18th *Vict.* c. 31.

It seems now incontestable that at Common Law, it is open to carriers to limit their Common Law liability by special agreement with the consignors of goods; and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence. The contract here is that the Appellants shall not be responsible "for damage to, or loss, or detention of passengers' luggage," and the question is, what is the meaning to be given to the word "loss?" Nothing can be more general than the words used by the parties. They do not enter into any distinction as to how the damage, loss, or detention may have been occasioned,

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whether by pure accident, or through the negligence, or even misconduct, of the Appellants. But the facts of this case make it unnecessary to consider whether, reasonably understood, they express an intention to protect the Appellants against answering for gross negligence or positive misconduct. Upon this their Lordships express no opinion whatever. The missing baggage is last seen in its transit from the shore at *Suez* to the "*Norna*," in which it should have been conveyed to *Mauritius*; it was then in the keeping of the Appellants by one of their servants. Their Lordships consider the circumstance that this servant insisted on having the keeping, and refused it to the Respondent's servant, raises no inference against the Appellants. Ordinarily speaking, it is a regulation prudent and convenient, that the Company's servants, and not the several passengers, should have throughout the custody of the baggage on board. It does not appear that anything was done but in obedience to such a regulation; at all events, no inference of want of due care or honesty is raised by this circumstance. How, after this, or when or where, the baggage in question was lost, there is no evidence to show. It is difficult to say what loss would be protected if this were not, or what meaning could be reasonably given to the word "loss," which would exclude such a non-arrival of the baggage as this. This is a contract to be construed on the general principles on which the construction of contracts is ordinarily determined. It would be a strange construction, and against common sense, when the parties have used the simple word "loss," to hold that they intended to limit its meaning to such cases as those in which the carriers should be able

to prove all the circumstances, and that those circumstances cleared them from all blame whatever. Every one must see that this at least is not the contract into which the parties have entered; yet this, in effect, was the contention for the Respondent. Their Lordships have no doubt, on the whole, that the loss in this case falls within the true meaning of the stipulation, and that the Appellants are thereby protected from being answerable for it. They will, therefore, humbly recommend to Her Majesty that the judgment below be reversed, with the costs in the Court below, and of this appeal.

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ON APPEAL FROM THE COURT OF ERROR  
AND APPEAL FOR UPPER CANADA.

THE COMMERCIAL BANK OF CANADA *Appellants*;

AND

THE GREAT WESTERN RAILWAY }  
COMPANY OF CANADA - - - } *Respondents.\**

THIS was an action brought in the Court of Queen's Bench for *Upper Canada* at *Toronto*, by the Appel-

17th, 18th, &  
19th July,  
1865.

\* Present: Lord Chelmsford, the Lord Justice Knight Bruce, and the Lord Justice Turner.

To an action  
brought by  
the Com-  
mercial Bank  
of *Canada*  
against the

*Great Western Railway Company of Canada* to recover the amount of advances made by the Bank to that Company for the completion of a Railway in the *United States*, connected in traffic with the *G. W. R. Co.*, the defence was, that the advances made by the Banking Company, though sanctioned by the shareholders, were foreign to the objects for which the *G. W. R. Co.* was incorporated; *ultra vires* the authority of the Directors of the Company and not binding upon the shareholders. At

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lants, against the Respondents, to recover the sum of \$940,000, and upwards.

The declaration was in *indebitatus assumpsit* for money lent, money paid, interest, work and labour done, and on account stated. The only plea was the general issue.

The action was tried at the *Kingston* Assizes, before Mr. Justice *Burns*, when a verdict was found for the Appellants, the amount of which it was agreed between the parties should be ascertained by a Referee, pursuant to the provisions of the Common Law Procedure Act, *Canada* consolidated Statutes, c. 22, s. 160, such Referee to have power, at the request of either party, to report upon the different classes of the account, such as amounts paid upon coupons, cheques, and promissory notes, or otherwise, and to draw up a statement of facts upon each for the opinion of the Court.

the trial it was agreed that, if the Plaintiffs were entitled to a verdict, the amount for which it should be entered should be ascertained by reference under the provisions of the Canadian Common Law Procedure Act, (*Canada* Consolidated Statutes, c. 22, sec. 160.) A verdict having been found for the Plaintiffs on the question of fact and law submitted by the Judge to the jury, the terms of such reference were specially endorsed on the record, leave being given to the Defendants to move for a non-suit or a new trial, on the grounds, first, of the verdict being contrary to the evidence, and secondly, misdirection of the Judge. By the terms of the reference, the Referee was to report upon the different classes of the account between the Banking Company and the *G. W. R. Co.*, and to draw up a statement of facts for the opinion of the Court. On a rule nisi for a new trial, the Court of Queen's Bench were unanimously in favour of the Defendants, and discharged the rule. Upon appeal from this decision to the Court of Error and appeal, that Court held that, though the verdict was not contrary to the evidence, yet there had been misdirection by the Judge in not directing the jury to find the extent of liability of the Defendants, and upon that ground granted a new trial. Held, on appeal, by the Judicial Committee, that though the *G. W. R. Co.* had exceeded the borrowing powers given by their original Act of incorporation, yet that sufficient borrowing powers having been given by subsequent Acts, and their exercise sanctioned by the shareholders, the borrowing was not *ultra vires* the authority of the Managers and Directors of the *G. W. R. Co.*, and that the grant of a new trial by the Court of Error and appeal on the ground of misdirection, was correct.

Subsequently, a rule *nisi* was obtained by the Respondents, to set aside this verdict, and to enter a nonsuit, pursuant to leave reserved at the trial, or to set aside the verdict and for a new trial, upon the ground that the verdict was contrary to law and evidence, and lastly for misdirection and non-direction, and the admission of improper evidence.

On the 20th of *December*, 1862, the Court of Queen's Bench, consisting of the Chief Justice, *Macleah*, Mr. Justice *Hagarty*, and Mr. Justice *Burns*, after argument, unanimously decided in favour of the Appellants and discharged the rule *nisi*.

The Respondents appealed from this judgment to the Court of Error and appeal of *Upper Canada*.

The appeal was heard on the 11th of *March*, 1864, before the Hon. *W. H. Draper*, Chief Justice of *Upper Canada*; the Hon. *P. M. M. S. Vankoughnet*, Chancellor of *Upper Canada*; the Hon. *W. B. Richards*, Chief Justice of the Common Pleas; Mr. Vice-Chancellor *Ester*; Mr. Justice *Morrison*; and Mr. Justice *Wilson*. Mr. Justice *Hagarty* was not present during the argument, but was during the delivery of the judgment of the Court. All the members of the Court were of opinion, that the Appellants were entitled to recover in respect of two loans of the sums of £150,000, and £100,000, and that the verdict was, therefore, properly found for the Appellants, though it was considered by the Court, that the Appellants were not entitled to recover in respect of any other items. The Chief Justice *Macleah*, considered that there were not any sufficient grounds for the appeal, and that it ought to be dismissed with costs; and that, if the Referee included any objectionable items in his report, those items ought to be rejected by the Court. Mr.

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Justice *Hagarty* (though he did not hear the arguments) expressed his opinion to the same effect; but the majority of the Court, considering that the extent of liability of the Respondents, upon the evidence furnished at the trial, should have been declared by the Court, determined that there should be a new trial, and which was eventually granted upon payment of costs.

From this decision the Appellants appealed to Her Majesty in Council.

The facts and local Statutes, relating to the *Great Western Railway Company of Canada*, bearing upon the question, as well as the evidence material to the issue raised, will be found fully stated and commented on in their Lordships' judgment.

The Attorney-General (Sir *R. Palmer*), Sir *Hugh Cairns*, Q.C., and Mr. *Shaw Lefevre*, for the Appellants; and

Mr. *Rolt*, Q.C., Mr. *Mellish*, Q.C., and Mr. *S. Percival*, for the Respondents.

The Appellants insisted, that upon the facts proved, and with reference to objections made on the trial, the Respondents were not entitled to a new trial. That the judgment of the Court of Error and appeal was erroneous, not only upon the facts and points taken at the trial, but also because the Court having directed that the Appellants were entitled to recover in the action, the amount of such verdict was by the agreement of the parties to be settled by the Referee, subject to the opinion of the Court, on the facts to be stated in his award, and that a new trial, therefore, which would open the whole question of liability, ought

not to have been ordered; that it was not competent to the Court of Error and appeal to set aside the agreements of the parties upon the faith of which the verdict had proceeded and both parties had acted: It was further urged, that upon the facts proved at the trial the Appellants were entitled to recover the whole of their demand, and that no part of the debt claimed by them was illegal or *ultra vires*; that the sum claimed and awarded was *bonâ fide* advanced and paid by the Appellants for the use of the Respondents without notice of any excess of authority of the Directors; and that the Company having received the moneys advanced and taken security from the *Detroit* and *Milwaukee* Railway Company for the whole of such advances, which securities they had since enforced, could not object that they had applied the moneys to purposes not mentioned in the Charter.

On the other hand, the Respondents contended, that the judgment appealed from was right; that the Company having no power under their Act of incorporation to borrow money for the purposes for which the amount sought to be recovered in the action was advanced by the Appellants, they had no power to lend to the *Detroit* and *Milwaukee* Railway Company, or to expend or advance for their benefit, any larger sum than £250,000, and that the Judge on the trial ought so to have directed the jury; and they further insisted, that there was no previous sanction or any subsequent ratification by the shareholders or Directors of the Respondents' Company.

In the course of the argument the following cases were cited:—

First, as to the power of the Directors to bind the

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shareholders, *The Royal British Bank v. Turquand* (a); *The Bank of Australasia v. Breillat* (b); *Ernest v. Nicholls* (c); *Macleay v. Sutherland* (d); *The Eastern Counties Railway v. Hawkes* (e); *The National Exchange Company of Glasgow v. Drew* (f); *Re Magdalena Steam Navigation Company* (g); *Burmester v. Norris* (h); *Re German Mining Company* (i); *Agar v. The Athenæum Assurance Company* (k); *Balfour v. Ernest* (l); and the *Canada Acts*, 4th Will. IV. c. 29, 16th Vict. c. 99, sec. 16, and 22nd Vict. c. 116, sec. 11. Secondly, as to the rule in granting a new trial, *The Great Western Railway Company of Canada v. Braid and Fawcett* (m), and cases there collected.

Judgment was pronounced by

LORD CHELMSFORD.

27th July,  
 1865.

This is an appeal from the judgment of the Court of Error and appeal in *Upper Canada*, reversing the judgment of the Court of Queen's Bench of that Province, and ordering a new trial in an action by the Appellants against the Respondents. The action, which was upon the common money counts, was brought to recover the balance alleged to be due to the Appellants for money lent and advanced to the Respondents. The Respondents pleaded that they were not indebted.

The Appellants, the Commercial Bank of Canada,

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|----------------------------|--------------------------------------|
| (a) 6 Ell. & Bl. 327.      | (b) 6 Moore's P. C. Cases, 152.      |
| (c) 6 H. L. Cases, 401.    | (d) 3 Ell. & Bl. 183.                |
| (e) 5 H. L. Cases, 331.    | (f) 1 Macq. Sc. App. Reps. 103.      |
| (g) 1 John. 690.           | (h) 6 Exch. Rep. 796.                |
| (i) 4 De G. M. & G. 19.    | (k) 3 Com. Ben. N. S. 725.           |
| (l) 5 Com. Ben. N. S. 601. | (m) 1 Moore's P. C. Cases N. S. 101. |

were incorporated under an Act of the Colonial Legislature, and have their principal office at the City of *Kingston*, with a branch office at *Hamilton* and other branches in *Canada*.

The Respondents, the Great Western Railway Company of *Canada*, were incorporated under a Statute of *Upper Canada*, the 4th Will. IV., c. 29 ; but the extent of the undertaking and their powers have been since modified and enlarged by several other Acts of the Canadian Legislature.

Under these Acts, the Company constructed its main line of Railway from the suspension Bridge on the *Niagara* River to the Town of *Windsor*, on the Canadian side of the river *Detroit*. On the opposite bank of this river was the terminus of a Railway in the *United States*, called the *Detroit* and *Milwaukee* Railway, which, when completed, was to extend across the State of *Michigan* in a westerly direction, so as to secure a large portion of the traffic of the Western States of *America*.

Prior to the year 1857, the Directors of the Great Western Railway Company of *Canada* had become impressed with the importance of securing the completion of the *Detroit* and *Milwaukee* line, with a view to the increase of the traffic upon their own Railway. Accordingly a traffic arrangement had been entered into between the two Companies, and the shareholders of the Great Western Railway Company of *Canada* had invested in Bonds of the *Detroit* and *Milwaukee* Company to the extent of £200,000.

In 1857, the *Detroit* and *Milwaukee* Company being in difficulties, and wanting funds to complete their line, entered into negotiations with the Directors of the Respondents' Company for a loan of £150,000.

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The subject of this loan was brought before the shareholders of the Company on the 8th of *October*, 1857, when a resolution was passed "that the Directors be authorized to advance to the *Detroit* and *Milwaukee* Railway Company such an amount not exceeding £150,000 sterling, as may be necessary to ensure the completion of the Railway across *Michigan* in connection with the Great Western Railway of *Canada*, such advance being made as a temporary loan and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company."

On the 1st of *January*, 1858, a mortgage deed was executed transferring to Mr. *Charles John Brydges*, the managing Director, Mr. *Thomas Reynolds*, the financial Director, and Mr. *Becher*, one of the general Directors of the Respondents' Company, as Trustees, all the property, both real and personal, acquired and to be acquired by the *Detroit* and *Milwaukee* Company, so far as they were not affected by previous mortgages, and vesting the entire control of the expenditure of funds to complete the line in the Trustees, and also the management of the Railway, and the disposal of the net income for assuring the repayment of the money advanced or to be advanced by the Great Western Railway Company of *Canada*, with interest at the rate of 10 per cent. per annum.

By a resolution of the English Board of the Respondents' Company, the expenditure of funds advanced by them for the works upon the *Detroit* and *Milwaukee* line was to be wholly under the direction and control of Mr. *Brydges* and Mr. *Reynolds*; and the Respondents having, by agreement with the

*Detroit and Milwaukee* Company, the power to nominate the members of the Board of that Company, and having named (amongst others) Mr. *Brydges* and Mr. *Reynolds*, they were respectively elected President and Vice-President of the *Detroit and Milwaukee* Company.

On the 7th of *October*, 1858, at a meeting of the proprietors of the Great Western Railway Company of *Canada*, a resolution was passed "that the directors be authorized to advance to the *Detroit and Milwaukee* Company a further sum of money not exceeding £100,000 sterling, to be expended by, and under the control of, the Great Western Railway Board of Directors."

In order to carry out the resolutions for the advance of funds by the Great Western Company of *Canada*, to the *Detroit and Milwaukee* Company, Messrs. *Brydges* and *Reynolds*, on the 29th *December*, 1857, entered into an arrangement with the Appellants, the Commercial Bank of *Canada*. The Respondents' Company had, in *August*, 1857, transferred their banking account from the Bank of *Upper Canada* to the Appellants' Bank, upon an arrangement that the Company was to have an overdrawn credit of £50,000, to be available when required by the Company for ordinary expenditure of whatever nature, and upon other terms unnecessary to be noticed.

For the purpose of the proposed expenditure on the *Detroit and Milwaukee* line, it was arranged that a separate account for the Great Western Railway of *Canada* should be opened at the Branch Commercial Bank at *Hamilton*, so that the expenditure might be kept distinct from the ordinary cash transactions of the Great Western Railway of *Canada*; that the account

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should be headed and known as "The *Detroit* and *Milwaukee* account, Great Western Railway ;" that the Bank should make advances, from time to time, on this account, and that such advances should be covered monthly by sterling Bills on the Great Western Railway Company, *London*, and that the available traffic receipts of the *Detroit* and *Milwaukee* line should also be applied in reduction of these advances.

This account was accordingly opened on the 30th of *December*, 1857, and operations upon it continued down to the 30th of *December*, 1859.

In the course of the transactions the following letter was written by Messrs. *Brydges* and *Reynolds* to Mr. *Park*, the Manager of the Bank at *Hamilton*, dated the 16th of *December*, 1858:—" With reference to the conversation which took place yesterday between you and Mr. *Campbell* and Mr. *Reynolds*, upon the subject of the *Detroit* and *Milwaukee* Railway Company's account with the Commercial Bank, we beg leave to state that the Great Western Company holds itself liable to the Commercial Bank for all overdraught on the *Detroit* and *Milwaukee* Company's account with the said Bank. This is quite understood by us; but as you expressed a wish to have it placed on record, we now do so by means of this letter."

At the close of this account a balance was alleged to be due to the Bank, amounting to upwards of \$945,000, upon which the action was brought.

At the trial it was agreed, that if the Plaintiffs were entitled to a verdict, the amount for which it should be entered, should be ascertained by reference, and an endorsement to that effect was made upon the Record. which will be the subject of future consideration.

At the conclusion of the Plaintiff's case the Counsel

for the Defendants applied for a nonsuit, upon various objections to the action in point of law, and leave was reserved to move the Court to enter a nonsuit. The Defendants then called witnesses, and after a discussion between the learned Judge and the Counsel on both sides, as to the questions of fact to be submitted to the jury, the following questions were put to them and answered as follows :—

1. To which Company was credit given by the Bank : to the Great Western or to the *Detroit* and *Milwaukee* ; or was credit given upon the responsibility of Messrs. *Brydges* and *Walker* ? Answer.—To the Great Western. 2. Had Messrs. *Reynolds* and *Brydges* authority from the Great Western Company to make financial arrangements for the *Detroit* and *Milwaukee* Company on account of the Great Western Company to the extent of £250,000, agreed to be loaned by the Great Western Company to the *Detroit* and *Milwaukee* Company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority ? Answer.—They had the authority, and the account was opened and conducted by them in pursuance of that authority. 3. Had the Commercial Bank notice at any time, while the account was going on, that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000, had been expended ? Answer.—The Bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority. 4. Suppose the original credit was given by the Bank to the Great Western Company, on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th *December*,

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1858, was given, either to the extent of the second loan of £100,000 sterling, or otherwise, or was the account continued on after that period, in the same manner as before by the parties? **Answer.**—There was no limitation, and the account was continued in the same manner as before the letter of the 16th *December*, 1858, was given. 5. Did the Great Western Company, by its dealings with the *Detroit* and *Milwaukee* Railway Company, reap the benefit of the expenditure made by the Commercial Bank on the *Detroit* and *Milwaukee* account? **Answer.**—They did.

The verdict was accordingly entered for the Plaintiffs, subject to a reference as to the amount in the following terms, endorsed by the learned Judge on the record :—"It is agreed by the Counsel for the parties in this case that the amount for which a verdict shall be entered, if the Plaintiffs shall be entitled to a verdict, shall be ascertained by a Referee or Referees to be chosen by the parties respectively in Term, or otherwise; and if the parties cannot agree upon a person or persons for that purpose, then it is agreed between the parties that I shall nominate the Referee as upon a compulsory reference. The Referee to have power, at the request of either party, to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes, or otherwise, and to draw up a statement of facts for the opinion of the Court."

In the following Term the Defendants moved the Court of Queen's Bench for a nonsuit, upon the leave reserved for that purpose, and also for a new trial for misdirection and want of direction on the part of the learned Judge before whom the action was tried, and

for the reception of improper evidence. This latter ground, however, was abandoned by the Counsel for the Appellants in the course of the argument upon the present appeal.

In considering the grounds upon which it was insisted that there should be either a nonsuit or a new trial ordered, it will be convenient to confine attention to those points which have been relied upon in the argument before their Lordships.

These, as to the nonsuit, were said to be the fourth and fifth points in the rule *nisi* for setting aside the verdict and entering a nonsuit, viz. :—Fourth, that Messrs. *Brydges* and *Reynolds* could not bind the Defendants at all, even though under the formality of a seal, as they had no power to borrow money on behalf of the Defendants for the present purpose, the Plaintiffs being aware that it was for the *Detroit* and *Milwaukee* Railway Company that the money was required. Fifth, that the Act allowing the Defendants to lend to the *Detroit* and *Milwaukee* Railway Company did not authorize a borrowing, and contemplated having the funds in hand before lending, and so the borrowing was *ultra vires*, and the Plaintiffs being aiders in the illegal object of the borrowing, could not recover against the Defendants.

Leaving aside for the present the question of how the funds were obtained by means of which the first advance of £150,000, was made to the *Detroit* and *Milwaukee* Railway Company, there can be no doubt that this advance being for a purpose foreign to the objects of the incorporation, would be *ultra vires*, and not in itself binding upon the shareholders of the Respondents' Company. But with respect to this loan, all objection is removed by the Act of the Canadian

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Legislature, 22nd *Vict.*, c. 116, the 11th section of which provides, that the loan of "seven hundred and fifty thousand dollars (£150,000) already made by the said Company to the *Detroit and Milwaukee* Railway Company, is thereby declared to be lawful."

So with respect to the advance of the £100,000, to the *Detroit and Milwaukee* Railway Company, which was made after the passing of the Canadian Act just mentioned, that advance is not objectionable on the mere ground that it was made for purposes foreign to the undertaking of the Great Western Railway Company of Canada, because by the same 11th section of the 22nd *Vict.* c. 116, it is enacted, that "the Great Western Railway Company shall have full power and authority to use its funds by way of loan or otherwise in providing proper connections, and in promoting its traffic with Railways in the *United States of North America*, provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person, or by proxy, at a general meeting of the shareholders specially called for that purpose." It is not disputed that the proper authority was obtained from the shareholders before this advance was made. But it is said, that with respect to the advance of the £150,000, the Act only renders the loan itself lawful, but does not legalize the borrowing by which it was made. And, as to the £100,000, that the Act merely gives power and authority to the Company to use its own funds in providing connection with or in promoting the traffic of Foreign Railways ; but gives them no power of borrowing for these purposes.

If the Company had no borrowing powers, or none

which could be employed upon such advances as those in question, it might be necessary to consider whether a distinction might not be taken between the loan of £150,000, which, having been already made, was expressly sanctioned by the Legislature, with (as it might be contended) all its circumstances, and the statutable power of applying the Company's funds in future, the terms of which would require to be strictly pursued.

But when the question upon the borrowing powers of the Company comes to be considered, there will be found to be no necessity for making a distinction between the two advances.

It is extraordinary that (as appears from the statement of Counsel) there were no borrowing powers conferred upon the Respondents' Company by the original Act of Incorporation ; but these powers are only to be found in a subsequent Act for increasing the capital stock of the Company, and in a section expressed in a declaratory form. This section is the 16th of the Canadian Act, the 16th *Vict.*, c. 99, by which it is declared and enacted, that " the Company have had and shall have power and authority to borrow money, from time to time, for making, completing, maintaining, and working the said Railroad, as they might or may think advisable, and to pledge the lands, tolls, revenues, and other property of the Company for the due payment thereof, and might and may make the Bonds or Debentures issued by them for securing the repayment of any sums so borrowed, or to be borrowed, convertible into stock of the said Company, on the terms and conditions expressed or to be expressed in such Bonds and Debentures or in the bye-laws of the Company." It was said by the

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Counsel for the Respondents that this section gave them power to borrow only on Bonds and Debentures ; and from the language of the section it may fairly be argued that the Legislature supposed that all the borrowings of the Company would be upon securities of this description. But it is not said that they shall not have power to borrow except upon " Bonds or Debentures issued by them for securing the repayment of the sums so borrowed." If, therefore, money were borrowed by the Company for the legitimate purposes of the undertaking, it would be no answer to the lender seeking to recover his money to say, that he had no " Bonds or Debentures" as a security for his loan. The 11th section of the Act of the 22nd *Vict.*, c. 116, makes it lawful to apply the funds of the Company to promote the traffic of other Railways. The money lent for this purpose is just as legitimately employed as if it were spent in " maintaining and working " their own line ; and if they have a right to borrow for the one purpose they have equally a right to borrow for the other. And although the first loan of £150,000, to the *Detroit and Milwaukee Company* was originally unlawful, yet when it was made lawful by the 22nd *Vict.*, c. 116, it was in the same predicament as if it had been so from the first, and consequently no sound distinction can be made between the borrowing from the Bank in respect of this loan and the borrowing for the advance of the £100,000.

There seems to be no ground, therefore, for holding that a nonsuit ought to have been entered.

The rule for a new trial for misdirection or want of direction presents much more difficulty.

The questions to be submitted to the jury were, with two exceptions, acquiesced in by the Counsel on both sides.

It is unnecessary to consider these questions in detail. The Court of Queen's Bench held, that there was no misdirection, or want of direction, involved in any of them. And although the Judges in the Court of Error and appeal did not enter into an examination of the mode in which the case went to the jury, they must have been of opinion, that there was nothing in the form of the questions which amounted to misdirection. In this opinion their Lordships concur, and are satisfied that, as far as the direction went, the facts to be tried were substantially left to the jury.

But the Court of Error and appeal proceeding upon a ground which (as the Chancellor of *Upper Canada* said) "was not presented to the Court below, nor prominently discussed before them," reversed the judgment of the Court of Queen's Bench, and directed a new trial. This ground was that "there was neither previous sanction nor knowledge, from time to time, nor subsequent ratification by the shareholders, or even the Directors of the Railway Company, of the dealings between Messrs. *Reynolds* and *Brydges* and the Commercial Bank in respect of the *Detroit* and *Milwaukee* Railway account beyond the sum of £250,000, and, therefore, that the Company were not liable beyond that amount. And the Court of Error thought that the extent of the Company's liability, upon the evidence furnished, should have been declared by the Court, and that in this view there ought to be a new trial."

It certainly appears that the opinion of the Judge as to the liability of the Company beyond the £250,000, was not in any way expressed upon the trial. The point was incidentally noticed in the third and

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fourth questions submitted to the jury, the third being, "Had the Commercial Bank notice at any time, while the account was going on, that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000, sterling, had been expended?" And the fourth, "Suppose the original credit was given to the Bank by the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th of *December*, 1858, was given, either to the extent of the second loan of £100,000, sterling, or otherwise? or was the account continued on after that period, in the same manner as before by the parties?" But the learned Judge gave no intimation of his opinion upon the question as to the extent of the Company's liability, which was an essential element in the determination of the amount which the Bank was entitled to recover in the action.

The point was raised, though not so distinctly as it might have been, upon the motion for a new trial; for in the rule one of the objections to the Judge's charge was "in his not directing that the expenditure of money by the Defendants on the *Detroit* and *Milwaukee* Railway was a matter beyond the scope and power of the Defendants, except to an extent authorized by a vote of the shareholders, and so illegal." And the question seems to have been discussed, though, as the Chancellor says, "not prominently discussed," before the Court of Error and appeal.

The Counsel for the Appellants object to the judgment of the Court of Error and appeal ordering a new trial, upon the ground, that the Company are liable to the Bank in respect of their dealings beyond

the £250,000, as the Bank had no notice of any excess of authority, supposing any to have taken place; and also that the extent of the Company's liability can be determined in the reference of the amount of the verdict agreed to at the trial, without sending the parties before another jury.

If the question as to the dealings beyond the £250,000, had arisen between the shareholders and the Directors of the Respondents' Company, there would be very little difficulty in deciding that the shareholders were not liable. The objects to which the moneys were applied would not have been a legitimate application of the funds of the Company without the Act, the 22nd *Vict.*, c. 116, and that Act expressly provides, that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person, or by proxy at a general meeting of the shareholders specially called for that purpose. If the conditions of the statutable power are not complied with, it is not lawfully exercised. But it is said, that the Bank is in a different position from the shareholders of the Company; that according to the case of *The Royal British Bank v. Turquand* (6 El. & Bl. 327), the Bank had a right to presume that there had been a resolution of the shareholders authorizing the borrowing beyond the amount of the £250,000, and the jury at the trial expressly found that "the Bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority."

It must be observed, however, that the Bank had the fullest information that the account which was opened on behalf of the Great Western Company was for the purpose of their making advances for the *Detroit* and *Milwaukee* Railway. They must have

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known that the Company could not apply its funds in aid of another Company without the authority of the Legislature. They must, therefore, upon the opening of the account, have been directed at once to the source of this extraordinary power, and must have learnt the conditions under which it was to be exercised. The words of the Act are negative and prohibitory: "No such expenditure shall be incurred unless by a vote to that end of two-thirds of the shareholders." The case differs in this respect from *The Royal British Bank v. Turquand*, for there the clause of the deed of settlement was an empowering clause, enabling the Directors to borrow on Bond such sums as should, from time to time, by a general resolution of the Company, be authorized to be borrowed; and this very distinction was taken by Chief Justice *Jervis* in that case, for after observing that parties dealing with the Bank were not bound to do more than to read the Statute and the deed of settlement, he adds, "and the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions."

The right of the Bank to claim in respect of the dealings beyond the £250,000, was clearly a question which ought to have been decided as a guide to the Referee in ascertaining the amount of the claim, and as there was a miscarriage in this respect on the part of the Judge, there must necessarily be a new trial, unless, under the terms of the reference as to the amount of the verdict, the question can be raised for the decision of the Court.

Upon this point, however, their Lordships, with every desire to save the parties the expense of another trial, are compelled to come to a conclusion adverse

to the view presented by the Appellants. The reference, which is evidently framed upon the provisions of the *Canadian* Common Law Procedure Act, is to ascertain the amount for which a nominal verdict for the Plaintiffs ought ultimately to be entered. The duty of the Referee under this reference would be to call for vouchers and proof of the different items contained in the particulars of demand. The reference provides, that the Referee is to have power to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes, or otherwise, and to draw up a statement of facts upon each for the opinion of the Court. There is nothing in this language which enables the Referee to say, "I will not look at the account beyond a certain date, because I think there was no liability of the Railway Company after that date;" and any report upon the limit to the liability which he could make, would not be "upon classes of the account, such as amounts paid upon coupons, &c.," but it would be a statement as to the provisions of the Act empowering the loan to the Foreign Railway, the resolutions of the shareholders of the Respondents' Company, and the facts which would prove knowledge, or want of knowledge, on the part of the Bank of the excess of authority. This consideration will be sufficient to show that the extent of the liability of the Respondents was not intended to be within the province of the Referee, and that it is not comprehended in the terms of the reference. A new trial seems to be the inevitable result of the omission to decide this question, and their Lordships will, therefore, recommend to Her Majesty to affirm the judgment of the Court of Error and appeal, and to dismiss the appeal, with costs.

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# ON APPEAL FROM THE ROYAL COURT OF JERSEY.

HUGH GODFRAY and JOHN GODFRAY. . *Appellants;*

AND

WILLIAM FRANCIS GODFRAY. . . *Respondent.\**

25th, 26th, &  
27th July,  
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According to the law prevailing in Jersey, a sale by an expectant heir of his expectancy, in the absence of fraud or inadequacy of consideration, cannot be impeached after the lapse of a year and a day from the time of opening the succession.

*Semble.* A sale by an expectant heir to his brothers is not by that law necessarily *contra bonos mores*.

Parties wronged by unconscionable bargains are, by the Jersey law of limitation, allowed a period of thirty years, computed from the date of sale, to impeach the transaction on the ground of inadequacy of consideration, and forty years from the death of the parents; but in order to justify the interference of a Court, evidence must be satisfactorily given that less than one-half of the value has been given for the property purchased.

A *Mandat* by the Jersey law is an authority from a principal to his mandatories to manage the property of the former, and on his behalf, as Agents.

*G.*, a native of Jersey, being in embarrassed circumstances, by a deed made in March, 1835, conveyed and transferred his expectant share in the heritable and moveable estate which would accrue to him on his parents' death, to his four brothers in consideration of an annuity. The deed contained a clause binding the parties that they would neither act nor authorize any one to act against the provisions contained in the deed on pain of perjury. By a voluntary deed executed in July, in the same year, by the four brothers, to which *G.* was not a party, it was agreed that the share of *G.* which should accrue at the time of the opening of the succession of his parents, after deducting the amount of his debts and of the annuity, should be paid to *G.*, if unmarried, but in the event of his marriage, then that the share should be applied for

THE Respondent instituted a suit, out of which this appeal arose, in the Royal Court of Jersey, against the Appellants and Philip and Francis Godfray, for the purpose of setting aside a deed of sale executed by the Respondent on the 24th of March,

\* Present:—Lord Chelmsford, the Lord Justice Knight Bruce, and the Lord Justice Turner.

1835, when in embarrassed circumstances, whereby he conveyed and assigned his expectant or presumptive share in the heritable and moveable estate which would accrue to him on the death and opening of the succession of his father, *Hugh Godfray*, and *Mary Elizabeth Tocque*, his wife, who were seized and possessed of immoveable and moveable property in the Island of *Jersey*, to his four brothers, the two Appellants, *Hugh* and *John*, and his two other brothers, *Philip* and *Francis*, in consideration of an annuity. This deed contained a clause binding the parties that they would neither act nor authorize any one to act against the provisions contained in the deed on pain of perjury. This deed was passed on oath, and registered in the Island. The suit sought further to revoke a settlement, dated the 17th of *July*, 1835, made between the Appellants and *Philip* and *Francis Godfray*, of the portion of the Respondent's share in the succession so conveyed and vested in them by the deed of the 24th of *March*, 1835. By such settlement it was agreed that at the death of their father and mother, the Respondent's portion should be placed in the joint names of the four brothers, and that there should be deducted from the moveable part (if sufficient) the sum of 9,600 *livres*, equal to £400

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the benefit of *G.*'s wife and children. Upon appeal, held by the Judicial Committee, reversing the judgment of the Royal Court of *Jersey*—

First, that the deed of *March*, 1835, was an absolute purchase of *G.*'s expectant succession, and that the settlement of *July*, 1835, was a voluntary deed by his four brothers for *G.*'s benefit, or in the event of his marriage, for his family's benefit, and if he had no family, for themselves ultimately, and did not constitute the four brothers' mandates for *G.*

Held further, that the oath taken by parties to a contract passed before the Bailiff of the Royal Court, to abide by it under pain of perjury, is to be considered to contain a tacit reservation, of just grounds of complaint.

*Semble*—there is nothing by the *Jersey* law to prevent the creation of trusts *inter vivos*.



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*Jersey* currency, which they had agreed to pay for the Respondent, and any other sum which they might think proper to pay for him in case he should become indebted, also the sums which they should have paid on account of the annuity under the deed of the 24th of *March*, 1835, with interest at £5 per cent. on the different sums ; and if the moveable part should not be sufficient, then out of the immoveable part therein mentioned, and that they would make up an account in *January* of each year of the rents and interest, and hold the balance in trust, if the Respondent was not married, for him or his benefit, and if he was married, that it should be lawful for them to apply it wholly or in part for the benefit of his family, or in the education of his children, but under no circumstances was it to be subject for the Respondent's debts ; and in case the Respondent, at his death, left one or more legitimate children, that the four brothers should continue the trust, and apply the annual produce for the maintenance and education, or otherwise for the benefit of the Respondent's children, and divide the capital and accumulation of interest among his children when they should respectively attain the age of twenty years ; and in case of the death of the Respondent without leaving any children, or in case his children should not attain the age of twenty years, then that the property should be divided in equal portions between the four brothers, or, in case of their death, among their respective children. And in case the Respondent should die before his father, the loss from the payment of the annuity was to fall on the four brothers equally ; and the four brothers mutually bound themselves and their heirs to fulfil that agreement upon the guarantee of all their property present

and future; and by another clause it was provided that, in case the Respondent died, leaving a widow without children, the widow should enjoy a third of the annual produce during her life, and if he left a widow and children, a third was to be paid to the widow, and the two-thirds applied as before mentioned.

After taking evidence, the inferior number of the Royal Court, on the 31st of *July*, 1862, by an *Acte* of that date, decided that the deed of sale and settlement, taken together, operated merely as a *Mandat*, or revocable authority, in the four brothers to administer the Respondent's property on his behalf, and that such *Mandat* might, and, in the circumstances, ought to be revoked, and the Respondent replaced in the management of his property. From this decision the Appellants, *Hugh* and *John Godfray*, appealed to the full Court, consisting of the Bailiff and eight Jurats, and which Court, by the casting vote of the Bailiff, by an *Acte*, or judgment, dated the 29th of *February*, 1864, dismissed the appeal and confirmed the decision of the inferior number, which judgment of affirmance was the subject of the present appeal.

The questions raised by the appeal involved the following points :

First, whether the contract of sale of the 24th of *March*, 1835, whereby the Respondent sold his expectant succession on the death of his parents in consideration of the annuity, constituted in the circumstances of his embarrassment, and in the absence of undue influence or fraud, a valid and binding conveyance by the law of *Jersey*, or was controlled by the settlement of the 17th of *July*, 1835, so as to create a trust, and to make his four brothers mandatory, managers and agents, for the administration of his affairs.

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Secondly, whether the right to impeach such deed of sale and settlement was barred by the law of limitation prevailing in the Island, (1) after a year and a day from the day of the opening of the succession on the parents' death, or (2) to impeach the transaction on the ground of inadequacy of price, after thirty years, and (3) forty years after the death of the parents, and

Lastly, the effect of the oath taken on passing the contract before the Bailiff, to do nothing contrary to its provision on pain of perjury.

Numerous authorities were cited, and an elaborate argument raised upon the origin, constitution, and application of the ancient Norman French law, as prevailing and administered in *Jersey*, illustrated by reference to the Civil law and the following decisions of the English Courts on sale by an expectant heir of his expectancy, by analogy bearing thereon. *Talbot v. Staniforth* (a), *Davies v. Cooper* (b), *Addis v. Campbell* (c), *Bromley v. Smith* (d), *Sturge v. Sturge* (e), *Shard v. Leach* (f), *The Earl of Chesterfield v. Sir Abraham Janssen* (g). The questions for the decision of the Judicial Committee in this appeal were, however, narrowed to those stated above, and the authorities as well relating to the ancient Norman French law as to its interpretation and application by the Royal Court of *Jersey*, are stated and referred to in the judgment.

The appeal was argued by

The Attorney-General (Sir *R. Palmer*) and Mr. *W. W. Mackeson*, for the Appellants, and

Mr. *Rolt*, Q.C., and Mr. *F. C. J. Millar*, for the Respondent.

(a) 1 J. & H. 484.

(b) 5 Myl. & Cr. 270.

(c) 4 Beav. 401.

(d) 26 Beav. 644.

(e) 12 Beav. 229.

(f) 31 Beav. 491.

(g) 2 Ves. 125. *White & Tudor's Sel. of Leading Cases*, note p. 395.

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The consideration of the appeal was adjourned, and their Lordships' judgment was now delivered by

The Lord Justice TURNER.

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This is an appeal from a judgment of the full Court of the Island of *Jersey*, dated the 29th of *February*, 1864, by which that Court affirmed a judgment of the inferior number, dated the 31st of *July*, 1862. The Appellants, *Hugh Godfray* and *John Godfray*, are two of the children of *Hugh Godfray* the elder and *Mary Elizabeth Tocque*, his wife, both now deceased. The Respondent, *William Francis Godfray* (hereinafter called the Respondent), is another of their children, and *Philip Godfray* and *Francis Godfray*, who have been served with this appeal, but have not appeared upon it, were and are their only other children. On the 24th of *March*, 1835, at which time *Hugh Godfray*, the elder, and *Mary Elizabeth Tocque*, his wife, the father and mother of the Appellants and Respondent, were both living, and were respectively seized of considerable real estate in the Island, and also possessed of personal estate. The Respondent, by deed or instrument of that date, conveyed and transferred to the Appellants and his brothers, *Philip* and *Francis Godfray* (hereinafter called the four brothers), in equal shares, for them and their heirs, all his parts and portions of heritages and moveables which should accrue to him by the deaths of his father and mother, situate in the Island of *Jersey* or elsewhere, from the day of the opening of their successions, without any reserve on condition that he and his heirs should be discharged from the payment of the proportion of charges, moveable and immoveable, to which he or they might be subject on account of the successions,

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and in consideration of an annuity of £110 5s. 4½d., which the four brothers bound themselves to pay to the Respondent for his life by four equal quarterly payments, the first payment to be made on the 24th of *June* then next; and this deed contained a clause, common in the Island conveyances, binding the parties by oath that they would neither act, nor authorize any one to act, against those presents on pain of perjury. This deed was in point of form duly made and passed on oath, and registered according to the laws of the Island.

On the 17th of *July*, 1835, by another deed or instrument of that date, to which the Respondent was not made a party, after reciting the deed of the 24th of *March*, 1835, and further reciting that the intention of the four brothers had not been to derive any personal advantage from the deed of the 24th of *March*, 1835, but only to prevent the Respondent from dissipating the share which might eventually come to him from the successions of his father and mother, the four brothers agreed that the share, as well as of moveables, as of heritage, which should accrue to the Respondent of the successions of their father and mother, should, at the decease of their father and mother, be placed in their joint names. That there should be deducted from the share of the moveables, if sufficient, the sum of 9,600 *livres* (equal to £400 *Jersey* currency) which they had agreed to pay on account of the Respondent, or such other sum as they should think proper to pay on his account, in the event of his owing debts to a larger amount, and also all sums which they should have paid to the Respondent on account of the annuity, with interest at five per cent. per annum on the several sums to the time of payment; and that, if what should accrue to the

Respondent from the moveable successions of his father, should not be sufficient to pay these sums and interest, then the four brothers should sell, or otherwise dispose of, rents necessary for the payment of them; and that, after these payments, the four brothers should receive the rents accruing on the share of the Respondent, and invest the residue of the moveable succession in the most advantageous manner, and should in every year, in the month of *January*, make up an account of the rents, and of the interest on the moveables, from which they should deduct the annuity, and, if there should be any surplus, should dispose of it as follows:—If the Respondent was not married, they should pay the amount to him, or apply it for his maintenance and support; and if the Respondent was married, they should apply it, in the whole or in part, to the maintenance and support, or in the education of his children, so that it should not, under any pretence, be stopped for the payment of his debts, and that in case, at the time of the death of the Respondent, he should leave any lawful child or children, the four brothers should continue the administration of the property, and the rents and interest should be applied for the maintenance and education of the children, and the surplus, if any, placed out for their benefit, and that, on the children attaining the age of twenty years, the capital and accumulations should be paid to them in equal shares, and that, in case the Respondent should die without leaving lawful children, or the children should die under the age of twenty years, the property should be divided in equal shares between the four brothers, and that, in case the Respondent should pre-decease his father, the loss of the sums paid in respect of the annuity should be borne by the four

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brothers in equal shares. By a memorandum at the foot of this deed, it was further agreed by the four brothers that, if the Respondent should leave a widow without children, the widow should receive one-third of the income during her life, and that, if he should leave a widow and children, one-third of the income should be paid to the widow for her life, and the remaining two-thirds be applied for the maintenance and education of the children. This deed and the memorandum at the foot of it were respectively signed by the four brothers.

On the 1st of *March*, 1839, *Hugh Godfray*, the father, died; and on the 23rd of *March*, 1839, a partition of his real estates in the Island was made by the four brothers. The deed of partition was duly passed before the Court, and by the deed portions of the estates were allotted to the Appellant, *Hugh Godfray*, as the eldest son, other portions to the Appellant, *John Godfray*, and to *Philip* and *Francis Godfray* respectively, and a part of the estates was also allotted to the four brothers as having the rights of the Respondent, *William Francis Godfray*, by virtue of the deed of the 24th of *March*, 1835. A partition was also made of the father's personal estate, the share of the Respondent being in like manner allotted to the four brothers. After the making of these partitions, and on the 28th of *March*, 1839, the Respondent signed a memorandum at the foot of the deed of the 17th of *July*, 1835, by which he confirmed and ratified the deed of the 24th of *March*, 1835, and approved the deed of the 17th of *July*, 1835, and bound himself to conform to it in all its contents. On the 9th of *May*, 1839, the Respondent gave a general power of attorney to his brother, *Francis Godfray*, to act for him in all his affairs.

On the 17th of *September*, 1844, *Mary Elizabeth Tocque*, the mother, died; and on the 10th of *May*, 1845, a partition of her estate was made in the same manner in all respects, as the partition of the father's estate had been previously made. After the death of his mother, and on the 12th of *October*, 1844, the Respondent again confirmed the deed of the 17th of *July*, 1835, by a memorandum written at the foot of it, and signed by him.

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On the 14th of *October*, 1844, the Respondent wrote to his brother, *Francis Godfray*, as follows:—  
 “My mother having died, you know my intention has always been to execute the agreement passed between you and my brothers, in relation to my share of the moveables and heritages in the succession of my father and mother, which agreement was confirmed by me on the 28th of *March*, 1839, and which agreement I again confirm; and I beg you, as my attorney, to cause it to be entered on the rolls of the Royal Court of *Jersey*, to give it full and complete effect. As I ought to enjoy the entire income, I authorize you to raise every year the sum which you shall think proper to be applied in paying you the sum of 2,400 *francs*, which I owe you, and to form a capital of 5,000 *francs*, to be placed in your name, or in your name and that of one of my brothers, for the purpose of being applied by you, in case of my death, for the maintenance and support of the two children, *Georgina Ernestine* and *Eliza*.”

On the 7th of *November*, 1844, the deed of the 17th of *July*, 1835, was duly registered in Court, and confirmed by the judgment of the Court in the presence of all the parties summoned for the purpose, *Francis Godfray* being a party, as well in his own



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individual name as in the character of attorney for the Respondent. This deed was also registered in the public registry of the Island. Some time after the passing of the deeds of the 24th of *March* and 17th of *July*, 1835, and on the 9th of *February*, 1856, the four brothers invested part of the Respondent's share of the personal estate affected by the deeds, in the purchase of rents in their names. The four brothers also, from time to time, paid over to the Respondent the income of his share of the successions, and rendered accounts to him, and on the 2nd of *February*, 1860, the Respondent signed a memorandum acknowledging that he had examined the accounts and found them to be correct.

The Respondent has never been married. On the 8th of *May*, 1862, he brought the action out of which this appeal has arisen, against the four brothers, to set aside the deeds of the 24th of *March* and the 17th of *July*, 1835, and the deeds of partition, and to recover his share of the succession of his father and mother, and for an account of the administration of them, founding the action upon these grounds: that at the date of the deed of the 24th of *March*, 1835, his father and mother were living, and that all agreements or stipulations relating to the successions of living persons are *contra bonos mores, et à l'ordre publique*, and radically null: that at the date of this deed the Respondent had no intention to sell, nor the four brothers to purchase, his (the Respondent's) share of the heritages and moveables in question, and that this appeared by the deed of the 17th of *July*, 1835, and the formal declaration of the four brothers contained in that deed; and, further, by the Respondent's share of the successions having been kept undivided:

that the alleged sale was fictitious, and intended only to protect the future property of the Respondent, and that it had no other effect [than] to vest in the apparent cessionaries the administration of the Respondent's future property, and did not operate to transfer the property to them: that even on the hypothesis of a sale, the sale would be null for want of an object which could be made the subject of agreement, and for deficiency of price, inasmuch as an annuity less than the revenue of the property alienated could not be considered as a fair price, or that the sale would be rescindable *pour lésion ou déception d'autre moitié*. So far as respects the deed of the 17th of *July*, 1835, the Plaintiff averred that it contained, on the part of the four brothers, a recognition and avowal that the deed of the 24th of *March*, 1835, was no more than a fictitious contract so far as it imported sale, and that on the part of the Respondent it had no other object than to consent to the administration of his brothers, and to constitute them his mandatory administrators; that henceforth, and whatever right they might previously have had, the four brothers, by their own avowal and consent, became the Respondent's ordinary mandatories, and that a mandate was temporary only, and subject to the will of the mandant, and was essentially and always revocable: that it was contrary to its nature and to the law to assign to it any certain duration, and that every stipulation of that kind ought to be considered as void, and that the right of revocation could not be renounced: that if the Respondent had power under certain circumstances, and on the solicitation of his brothers, to confer on them temporarily the administration of his property, such circumstances no longer existed, and as to the deeds of partition,

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that they were merely the consequences of the deed of the 24th of *March*, 1835.

The Appellant, *Hugh Godfray*, pleaded to the action. As to the deed of the 24th of *March*, 1835, that no deed passed before justice was null, and that deeds so passed were, at the most, subject to be set aside under circumstances: that in cases of deeds subject to be set aside, the action to set them aside must be brought within a year and a day after the opening of the rights of action, and that after the lapse of that time the deed could not be set aside, but remained in full force: that, supposing the deed of the 24th of *March*, 1835, was at any time liable to be set aside, the Respondent's right of action to set it aside accrued immediately on the death of his father and mother, respectively, and that the Respondent having not only allowed the year and a day to elapse without having taken any proceedings to set aside the deed, but having recognized and ratified it, could not be allowed to demand its annulment; and, further, that a person who had passed a deed and taken an oath to do nothing contrary to it, could not, at law or in equity, be allowed, against his oath, to liberate himself from the engagements which he had undertaken in passing the deed: that the deed of the 24th of *March*, 1835, remaining in force, the Respondent had no right to demand that the deeds of partition should be set aside, and was equally without right to demand the annulment of the deed of the 17th of *July*, 1835, which was a consequence of the deed of the 24th of *March*, 1835, the parties to it having no power to make or agree to it except from the deed of the 24th of *March*, 1835, having vested the property in them. The Appellant, *Hugh Godfray*, further pleaded that the deed of the 24th of *March*, 1835,

was not liable to be set aside *pour cause de déception d'autre moitié du juste prix*: that the deed of the 24th of *March*, 1835, the deed of the 17th of *July*, 1835, and the deeds of partition, did not contain any disposition which was unlawful, or *contra bonos mores*, and that there was neither *lesion* nor fraud in the deeds, which had been passed of the free will and with the full assent of all the parties: that all the deeds had been frequently recognized, sanctioned, and confirmed by all the parties, and particularly by the Respondent, in having, on two occasions and at distant intervals, signed a formal approval of them: that the deed of the 17th of *July*, 1835, having been entered on the rolls of the Court of Heritage, in the presence and with the consent of all the parties, ought, as to all the parties, to be deemed to have the force of a judgment, and to be consequently irrevocable: that the deed of the 24th of *March*, 1835, and the deed of the 17th of *July*, 1835, had existed for twenty-six years, and had during all that time been acted upon with the consent of all the parties, and that many contracts of purchase and assignment had been passed, and transactions to a considerable amount effected on the faith of them, and that it would be contrary to all principle that, after having given effect to them for so long a time, one of the parties should be permitted to set them aside. The Appellant, *John Godfray*, pleaded to the same effect.

The cause was heard before the inferior number of the Royal Court, in the months of *June* and *July*, 1862, and on the 31st of *July*, 1862, that Court gave judgment to this effect. After recapitulating the facts to the effect above stated, the Court adjudged that, under the circumstances, the Plaintiff (the Respondent) by his

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acts since the opening of the successions and other subsequent acts, as well before as after the entering of the deed on the rolls of the Royal Court, had not only debarred himself of his right to insist on the nullity of the deed of the 24th of *March*, 1835, but had become bound to hold all transactions, both hereditary and moveable, done in his name by his mandatories, in consequence of that deed, to be good and irrevocable; but considering that the Defendants (the four brothers), by the deed concluded between them on the 17th of *July*, 1835, had acknowledged that their intention was not to derive any personal advantage by the passing of the deed of the 24th of *March*, 1835, but that that deed was passed with a view to prevent the Plaintiff (the Respondent) from dissipating his property, and that the measures which were taken were to save and administer his property for him, and in his name and for his advantage, and that the Defendants (the four brothers) had acted with this object ever since, and that, looking to the actual circumstances, there was no reason for continuing these precautions in force, the Court recognized the Plaintiff's (the Respondent's) demand to revoke the *Mandat* which he had entrusted to his brothers, and adjudged that he was capable to act and interfere by himself in the administration of his property, and accordingly ordered that the parties should go before the *Greffier*, and that the Defendants (the four brothers) should deliver to the Plaintiff (the Respondent) all the rights, titles, documents, and evidences belonging to him, which were in their possession or at their disposal, relating to the personal estate and heritages of the Plaintiff (the Respondent) of which they had had the administration, and should render accounts of their

administration since the 31st of *December*, 1859, to be passed in conformity with the transactions between the parties.

From this judgment the Appellants appealed to the full Court; but the full Court, by the majority of the Bailiff, affirmed the judgment. The appeal we have now to dispose of is from the judgment of the full Court.

The first points to be determined upon this appeal are, whether, according to the true effect of the deeds of the 24th of *March*, 1835, and the 17th of *July*, 1835, the Appellants became, as they have been held in the Courts of the Island to have become, the mandatories of the Respondent, *William Francis Godfray*, and, if not, what was the true purport and effect of those deeds, assuming them to be valid and effectual according to the laws of the Island. These points, it is to be observed, depend wholly upon the contents of the deeds, there being no evidence to explain them; if, indeed, such evidence could have been received. It is to be observed, also, that a *Mandat*, in the sense which the Courts of the Island have attached to the word in this case, is an authority from a principal to his mandatories to manage the property of the former on his behalf, and as his Agents.

First, then, having regard to these observations, can the deed of the 24th of *March*, 1835, be considered as a *Mandat*? Now, in the first place, it is in the highest degree improbable that the Respondent could have intended, at that time, to appoint Agents to manage property to which he had not yet succeeded, and his succession to which was doubtful, and might be distant. And, in the next place, the deed itself is, in every respect, in the form of a deed of purchase.

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And it imposes on the four brothers of the Respondent an obligation wholly foreign to the character of a *Mandat*—an obligation enforceable at law, to pay him out of their own pockets an annuity for life, at the risk of their never being reimbursed, for he might die in the lifetime of his parents, after receiving his annuity for several years, or his parents might leave nothing. This instrument, therefore, certainly does not, of itself, bear the character of a *Mandat*, and the view that it was not intended to bear that character is confirmed by the deed of the 17th of *July*, 1835.

That deed recognizes the deed of the 24th of *March*, 1835, and the obligation created by it for the payment of the annuity, as in full force; and it purports to deal with the property conveyed by the deed of the 24th of *March*, 1835, as if the four brothers were absolute owners of the property. The Respondent was not made a party to it, which was perfectly natural and correct, if they were such owners, but would be most strange and unaccountable if the deed formed part of a *Mandat*, and comprised a scheme for the management or disposition of his own property. Moreover, it provides for the application of the income in a mode calculated and expressly intended to protect the property from the claims of the Respondent's creditors. But this, of course, could not be effected by a mere revocable *Mandat*. It would require that the property should be withdrawn altogether from his power and control. This deed of the 24th of *March*, 1835, cannot, therefore, in our opinion, be held to be a *Mandat*.

Then, ought the deed of the 17th of *July*, 1835, to be so considered? Now, this deed is in every respect in the form of a settlement containing limitations and provisions not in favour of the Respondent only, but

in favour also of any wife or children he might have, and failing wife and children, in favour of the four brothers, and there is no power of revocation contained in the deed. We see, therefore, no ground for holding that this deed could have been intended of itself to operate as a *Mandat*. Reliance was placed, on the part of the Respondent, and the Courts of the Island appear also to have relied, upon the recital contained in this deed:—" *Vu que le but desdits Hugh Godfray, &c., n'était point de retirer aucun avantage personnel par la passation dudit contrat, mais d'empêcher que ledit W. F. Godfray ne dissipât la part qui eût pu lui revenir dans les successions de son père et de sa mère.*" But this recital does not seem to us in any way to import that the instrument was to operate as a *mandat*. It states no more than what the object of the brothers was in making the purchase, leaving it to the operative parts of the deed to explain the mode in which that object was to be carried into effect; and as to the statement that the brothers did not intend to derive any personal advantage from the purchase, this is answered by nothing more being reserved to them than a mere contingent interest in the property, failing any wife or child of the Respondent. The recital, in fact, has reference merely to the principal object of the transaction, which no doubt was to secure the property for the benefit of the Respondent and any family which he might have. These transactions, therefore, do not appear to us to operate as a *mandat*.

We think the true character of them was this. An absolute purchase by the brothers of the Respondent's successions, followed by a settlement, voluntary on their part, chiefly and mainly for the support of him and his family, and the payment of his past

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debts, and only in case he had not a family, for themselves ultimately, who would in that case be his natural successors.

Much was said in the course of the argument upon the question whether these instruments were to be considered as separate transactions, or as separate parts of the same transaction ; but this does not appear to us to be material as to this part of the case, for in either view there would be a settlement quite inconsistent with a *Mandat*. We find ourselves unable, therefore, to agree in the opinion which the Courts of the Island have formed on this case. We have hitherto, it will be observed, dealt with the case upon the footing of the deeds to which we have referred, being valid and effectual according to the laws of the Island. We now proceed to consider, whether they are so or not, which in truth seems to us to be the real question we have to decide. In considering this question, it will be convenient to deal separately with the two deeds.

First, then, is the deed of the 24th of *March*, 1835, according to the law of the Island, valid as a deed of purchase ?

The Respondent contends that it was not merely voidable, but absolutely void *ab initio*, and incapable of confirmation ; and that, even if it was merely voidable, he had a period of forty years, or at least of thirty years, to set it aside, the shorter of which periods had not expired when he commenced this suit.

The Appellants, on the other hand, contend that a sale by an expectant heir of his expectancy is, by the law of *Jersey*, perfectly good and unimpeachable ; and that, even if such a sale be impeachable, it

cannot, in the absence of fraud or undervalue, be impeached after the lapse of a year and a day from the time of the opening of the succession. In support of their first proposition, the Appellants rely on three precedents of deeds passed by the Royal Court and registered, of sales of their expected successions by expectant heirs (*a*), and on two precedents of decisions by the same Court in contested cases. But as to two of the deeds referred to, the parents from whom the expected successions were to come were parties to the deeds, and this is a circumstance which is allowed on all hands to form an exception, and to make the transaction valid. As to the third deed, however, the parent was not a party; but this precedent can hardly be considered to prove more than this—that sales of this kind, whether questionable or not, sometimes take place without being questioned.

As to the decisions referred to, in one of them, *Le Bas v. Le Bas* (*b*), a case not quite like the present case, but not very dissimilar, the father of the vendor being the owner of the property, the succession to which formed the subject of the sale, was a party to the transaction, and, therefore, the case is not in point. As to the other of them, *Le Feuvre v. Le Feuvre* (*c*), a case in which a female, in consideration

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(*a*) *Le Cornu to Le Cornu*, passed before the Bailiff of the Royal Court 12th August, 1812, a deed of sale and transfer of personal estate of succession in expectancy. *Falle to Falle*, 8th April, 1826, to the same effect. A similar deed from *Dumaresq to Dumaresq*, dated the 11th October, 1836.

(*b*) *Le Bas v. Le Bas*, 28th of June, 1860, a partition of a succession in expectancy was held by the Royal Court of Jersey to be good.

(*c*) *Le Feuvre v. Le Feuvre*, 3rd of July, 1794, a transfer of succession in expectancy, was by the same Court held good.

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of being maintained by the purchaser for the remainder of her life, and decently buried after her death, conveyed to him all her future expectations, and the transaction was attempted to be impeached by her heir, the grounds on which the Court upheld it do not appear.

We think, therefore, that the Appellants' first proposition, that sales by expectant heirs of their expectancies are absolutely unimpeachable, cannot be supported upon the authority of these precedents, more especially having regard to the general law upon the subject, to which we shall presently refer.

Another point on which the Appellants relied in support of their first proposition was, that the Respondent was precluded from disputing the sale by the oath which he took to abide by it. And the case *Gabeldu v. Gallichan* (a) was cited on that point. There the Plaintiff alleged that a parcel, not intended to be included in a purchase, was by the Defendant fraudulently inserted in the purchase deed; and the Court held, that as the Plaintiff had sworn to observe the deed, he could not afterwards gainsay it: it was his duty to read it before he pledged himself to its observance. Whatever may be thought of the soundness or unsoundness of this decision, it does not go to the length for which it has been cited. But it would be strange indeed if the decision were to be

(a) *Gabeldu v. Gallichan*, 8th May, 1845. In this case the Royal Court held that a contract passed on oath before the Court cannot be set aside, though it was alleged that property had been fraudulently comprised in the contract.

In *Lempriere v. Trachy*, 21st September, 1598, it was held by the Royal Court, that a contract which is confirmed by the parties thereto by an Act of Court, in which the parties swear to abide by the contents of the contract, is equivalent to, if not more binding than, a judgment of the Court.

applied universally: it would be making the oath an instrument of injustice, by restraining parties in the most flagrant instances of wrong from obtaining redress. It is only right to consider the oath as containing a tacit reservation of just grounds of complaint. Upon this head *Berault* is explicit. Speaking of an hypothecation invalid as *contra bonos mores*, he observes: “*N’importe si elle [scil. la obligation] est validée par serment, parce que le respect de la religion ne confirme point les mauvaises mœurs;*” and he cites the Civil law to the same effect. 1 *Comm. de Berault*, 536 [Ed. Rouen, 1776].

No authority, then, has been cited, and probably none can be cited, sufficient in our opinion to show that a sale by an expectant heir of his expected succession, made without the concurrence of the person from whom it is to descend, is absolutely unimpeachable. All the Text writers and Commentators on the Norman law, treat it as either voidable or void: but in which of these two lights it ought to be viewed there is a great difference of opinion. Writers of great and equal eminence range themselves on different sides. The controversy extends to transactions of other kinds, whereby future rights are interfered with or modified. Many of the writers upon the subject make a distinction between contracts forbidden because they affect the rights of individuals, and contracts forbidden as *contra bonos mores*. They consider the former to be only voidable, that they are good until set aside by judicial process, and may be confirmed or rendered indisputably good by the lapse of a short period of prescription without reclamation. They consider the latter to be absolutely null, as if they had never been made, not admitting of confir-

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mation, and not requiring a judicial sentence to set them aside, and that possession under them is simply adverse and wrongful possession. Other writers draw no such distinction, but include all such contracts in the former class of voidable contracts.

The prohibition against an expectant heir dealing for his future inheritance is derived from the Civil law, which, amongst other objections to it, treated it as *contra bonos mores*, because *inducit votum captandæ mortis alienæ*; *Cor. Jur. Civ.*; *Code, lib. viii. tit. 39*; *Dig., lib. xlv. tit. 1, 61*; and the prohibition as well as the reasons for it, were thence imported into the Norman law. It is not perhaps clear, having regard to the relationship of the parties and the rights of succession consequent upon it, that a case like the present would fall within that principle.

But even assuming the contract to be *contra bonos mores*, the question still remains which of the opinions of the writers on the subject should be adopted, that the contract was void, or that it was only voidable. If we were to rely exclusively or chiefly on the Continental writers upon the *Coutume*, it might be difficult to arrive at a conclusion on this point; but we have, upon this subject, the authority of *Le Geyt*, as high an authority as can be produced on the local law of *Jersey*. He flourished later than the eminent writers to whom reference has been made—*Rouillé, Terrien, Godefroy, Berault, Basnage*, and others, who are the most frequently quoted in the Courts of the Island. He filled, with the greatest approbation, the highest judicial office in the Island, that of Lieutenant-Bailiff, for a period of sixteen years (1676—1692); he then resigned that office, but continued on the bench as a *Jurat* for a further period of

eighteen years (a). During this latter period he composed his various legal Treatises, which appear to have been very carefully prepared (b). Since his time they have always been considered of authority (c). Until recently they existed only in MS., in which form many copies had long been circulated in the Island. In 1846 they were printed under the authority of the States, and at the public expense. In his Treatise "*De la Nullité des Contrats et des Sentences*," vol. i. p. 119, *et seq.*, he discusses the question of the degree of invalidity attributable to contracts of a nature cognate to that in the present case, and like it, prohibited by the *Coutumier*; deeds by a proprietor in possession in favour of some members of his family in derogation of the rights of succession of other members. After reviewing the conflicting opinions of the Continental writers on the *Coutumier*, he comes to the conclusion that the strictness of the Civil law had been much mitigated, and that all such contracts are merely voidable, requiring a judicial sentence to supersede them. He next deals with contracts by expectant heirs, and with respect to these he comes to the same conclusion, vol. i. p. 122: "*Un autre exemple d'un contrat contre loi, mais qui n'emporte pas une pleine et absolue nullité de droit, c'est quand on contracte de la succession d'un homme vivant, pactum de hereditate viventis.*" He is treating throughout of the local law of *Jersey*, upon which his opinion ought to be allowed greater weight than that of any of the old French commentators, however

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(a) Life of by M. Maréchal, prefixed to the first volume of *Le Geyt's* works.

(b) *Ib.*, *Le Geyt*, preface.

(c) Report of Commissioners on the Laws of *Jersey*, 1861, p. iv.

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eminent, upon the *Coutume*, and, *d fortiori*, than that of more modern French writers, who speak of the existing law of their own country.

The current of modern decisions of the Courts of the Island is altogether in accordance with the opinion of *Le Geyt*. The Appendix to the present case contains fourteen precedents (a) of the Royal Court,

(a) The following are the precedents of the Royal Court of *Jersey* here referred to:—

*Prouings v. Laell*, 19th October, 1588.—In this case an heir was held debarred from revoking a disposition of heritable property by the ancestor after a year and a day from the death of the latter.

*Averty v. Averty*, 20th January, 1596.—Father settles a house on his wife to the prejudice of his son and heir. Partition excluding the house; heir too late to reclaim the house after the year and a day.

*Nicolle v. Falle*, 23rd April, 1601.—Gift of heritable property of her mother by a sister to her full brother, to the prejudice of her half brothers, cannot be revoked after a year and a day from the death of the donor.

*De Carteret v. Robin*, 28th April, 1698.—Purchase of property by a wife during coverture; heirs of husband omitted to revoke it for a year and a day after his death; too late to revoke.

*De la Cour v. Esnouf*, 23rd September, 1708.—Conveyance by father to son to prejudice of daughter; not annulled within a year and a day from the death of father; held too late.

*Richardson v. Penington*, 30th April, 1718.—Gift of Rentes by husband to his wife to prejudice of brother; not revoked within a year and a day from death of husband; held too late.

*Trachy v. Le Marines*, 8th June, 1714.—Sale of ancestral property subject to being replaced; too late to sue for the replacement after a year and a day from death of the seller.

*Amy v. Pallot*, 17th May, 1744.—Transfer to eldest daughter to the prejudice of the younger daughter; not set aside because action brought after the year and a day.

*Robichon v. Le Tublin*, 4th October, 1768.—Lease by a married woman to the prejudice of her collateral heir; the heir making no claim for a year and a day after her death was barred.

ranging from 1588 to 1842, of cases upon transactions forbidden by the *Coutumier*, but upheld by the Courts, and so upheld upon grounds which imply that they were voidable only. It is true that not one of these cases was the case of an expectant heir selling his expectancy ; but some of them were cases of transactions condemned by the old law as *contra bonos mores*, and are, therefore, authorities in point. No authority has been produced on the other side of the question, where the transaction was free from the taint of fraud or under-value.

Provided, then, that the purchase of *March*, 1835, was free from fraud or inadequacy of consideration, the just conclusion appears to us to be that, originally, the transaction was merely voidable. Taking then the deed of the 24th of *March*, 1835, to have been voidable only, it is next to be considered what period was allowed for avoiding it, and we think that the law

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*Hamon v. Malzard*, 19th November, 1816.—Gift to one collateral heir to the prejudice of the rest ; not set aside because no claim made within the year and a day.

*Amy v. Horman*, 28th June, 1825.—Assignment of *rentes* by a wife for the benefit of her husband, under condition of his replacing the same ; the wife and her second husband barred by not bringing their action for replacing the same within a year and a day after the death of first husband.

*Le Gallais v. Moignard*, 10th October, 1833.—Property purchased by a husband and wife on survivorship ; sale by father to son to prejudice of the wife ; wife surviving ; held barred after the year and a day.

*Le Cornu v. Marett*, 12th May, 1842.—Purchase by husband and wife on survivorship, which is by law subject to be set aside by the heir of husband. Such heir omitting to set it aside for the year and a day was barred.

*Le Blanc v. Arthur*, 24th April, 1729.—A sale at an undervalue was sought to be set aside by heirs of the vendor ; held too late.



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of *Jersey* leaves no doubt upon this point, that in the absence of fraud or under-value, the deed could not be impeached by the Respondent after the lapse of a year and a day from the days of the opening of the successions, and that after the lapse of those times without any suit being instituted to set aside the purchase, the deed became absolute and indefeasible as regards the succession from each of Respondent's parents. All the Text writers, and all the cases last referred to (a), establish this point. Had, indeed, the doctrine of absolute nullity prevailed, the Respondent might have been entitled to a period of forty years from the death of each parent to claim his succession from that parent (see Report of Commissioners of the laws of *Jersey*, 1859, p. xii.), subject, of course, to any impediment which might have arisen from the settlement of *July*, 1835, having been confirmed by him.

The Respondent attempted to found an argument for his right to the longer period of forty years upon the fact of his share having been to the present time kept together, instead of being partitioned among his four brothers. But this argument is, in our opinion, untenable. Where the principal heir fails to make a partition, or wrongfully retains in his own hands the share of a parcener, the latter is allowed this period for claiming his share. But here the estates of the parents respectively were properly partitioned after their deaths, the Respondent's share forming one of the five portions, and being expressly allotted to the purchasers of it. This was quite regular; it belonged to them, and they had agreed, as they had a right to do, to keep it together for the purpose of

(a) See Note *ante*, p. 340.

applying it according to the trusts which they had created.

Failing the right to the period of forty years for impeaching this sale, the Respondent insisted that he was entitled to a period of thirty years for impeaching it, upon the ground that the sale was for inadequate consideration, and he claims to set it aside on that ground. He claims to do so in one or other of two ways,—either under the customary law, as now established in the Island, or by applying the principles recognized in English Courts of Equity with reference to sales by expectant heirs.

By the local customary law, parties wronged by unconscionable bargains are allowed a period of thirty years, reckoning from the date of the sale, to set them aside. But the ratio of inadequacy of consideration is strictly defined. “*Grand Coutumier*,” by *Rouillé, ad finem (Stille de procéder)*, lxxx. [Ed. Rouen, 1539.] *Terrien*, 329 [Ed. Rouen, 1554]. According to the *Coutumier*, in order to justify the interference of the Court to set aside a sale, proof must be given by the Plaintiff that less than half the value has been given for the property purchased. A case of the year 1598, *Lempriere v. Trachy*, has been cited, from which it would appear that the ratio had been altered in *Jersey* to two-thirds; but this alteration appears to stand upon the questionable authority of the Ordinances of the Commissioners, Messrs. *Pyne* and *Napper* (a). But whichever of the two be the present legal limit, the result, in this case, is the same: the cases of sales of property of uncertain value do not fall within the rules.

The Commentators who are of authority upon the

(a) See Report of Commissioners on the Laws of *Jersey*, 1861, pp. vii. lv.

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subject lay it down that the process for rescinding a bargain for inadequacy of consideration cannot be applied to sales of things of doubtful value. Thus, *Berault* :—" *Faber resoult que ladite loy n'a point de lieu en vente de choses douteuses. Ce qui fait à la question tant débattue si elle a lieu en vente de choses universelles, come d'une succession, ores que la consistance en soit inconnue au vendeur : car la valeur en est incertaine, à cause de l'ignorance des debets et charges passives : Et conséquement le vendeur ne peut alléguer de déception qui a reçu un prix certain pour une chose incertaine.*" 1 *Berault*, 77 [Ed. Rouen, 1776].

*Pothier* is of this opinion. "*Œuvres de Pothier*," *Tom. ix. p. 326* : [Ed. Paris, 1827].

The local law of *Jersey* thus providing for the case, it is, of course, out of the question to apply the principles of the English law, if, indeed, it could in any case be done.

In the view which we have taken of this case it may not, perhaps, be necessary for us to enter into the question of the validity of the deed of the 17th of *July*, 1835; but as it was argued that the whole transaction between these parties was in effect a transaction of settlement of the Respondent's successions, and not a purchase, it may be right for us to state our opinion as to the effect of this deed. The Respondent raises two objections to it: first, that it was not passed on oath, in the usual way; and, secondly, that the performance of the trusts cannot be enforced.

Until recently trusts were unknown in *Jersey* (Report of Commissioners of 1859, p. xxv.). Within the last half-century several instances have occurred of conveyances of land upon trusts for public objects;

two instances are given in the Appendix (a). In each case the deed, passed on oath in the usual way, served both as a conveyance of the land and for the declaration of the trusts. In the present case the property was first conveyed by the deed of the 24th of *March*, 1835, and the legal ownership has since remained unchanged; but a subsequent declaration of trust was made by an independent instrument, that of the 17th of *July*, 1835. Did this require the same formalities as a legal conveyance? Probably the question has never yet arisen in *Jersey*, and will now have to be determined on principle. There seems to be no ground for holding that such formalities are necessary. A writing signed by the competent parties ought surely to be sufficient evidence of the trusts, if the law allows such to be created; and the law of *Jersey* does not, it would seem, forbid the creation of trusts by acts *inter vivos*. Report of Commissioners of 1859, p. xxv.

Next, were the trusts of the settlement binding upon the parties who executed it? Whatever was the case before the death of the father of the parties, and before the contents of the settlement were communicated to the Respondent and acted upon, it would appear, on principle, that when it was so communicated and adopted by him, and acted upon by all parties, it became binding upon them. The Respondent adopted it, for he confirmed it twice, and received payments in excess of his annuity from the very first,

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(a) *Aubin to The St. Hellier's General Cemetery Company*, dated 25th *March*, 1854. *Edge to The Gas Company*, dated the 30th *September*, 1856.

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in strict conformity with its provisions, as appears from the accounts filed in this case. On the other hand, the four brothers were clearly bound by it.

It was suggested in argument that these deeds were open to impeachment upon the ground of fraud, or inadequacy of consideration. With the question of inadequacy of consideration we have already dealt, and there appears to be no ground whatever for imputing fraud to the four brothers.

There are many other facts in this case which are much in favour of the Appellants, more especially the acts of confirmation on the part of the Respondent, the long period during which he has received the benefit of the instruments in question, and the great delay on his part in instituting these proceedings, this action not having been brought by him until twenty-seven years after the bargain was made, twenty-three years since the father's succession fell in, and eighteen years since the mother's fell in; but we do not think it necessary to comment upon these points. For the reasons which we have stated, we are of opinion, that the judgment under appeal cannot be maintained, and we shall humbly recommend Her Majesty to reverse it, and to dismiss the action with costs, to be paid by the Respondent, who must also pay the cost of the appeal.

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ON APPEAL FROM THE COLONY OF  
VICTORIA.

THE QUEEN - - - - - *Appellant,*

AND

FREDERICK WILLIAM DALLIMORE, }  
JOHN HENRY CLOUGH and } *Respondents.\**  
WILLIAM BOGG - - - - }

THIS was an appeal from a judgment of the Supreme Court of *Victoria*, making absolute a rule to enter a verdict for the Defendants, in an action of ejectment brought by the Crown against the Respondents.

The question in dispute was the title of the Crown to certain lands in that Colony which were in the occupation of the Respondents.

The Respondents, *Clough* and *Bogg*, were on the 21st of *January*, 1861, and for some time previously

\* Present :—Lord Chelmsford, Sir John Taylor Coleridge, Sir James W. Colvile, Sir Edward Vaughan Williams.

5th, 6th, &  
7th Dec.  
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Construction  
of the  
*Victoria*  
*Colonial Acts*,  
24th *Vict.*  
No. 117, and  
the 25th *Vict.*  
No. 145, for  
regulating  
and amending  
the laws relat-  
ing to the  
sale and occu-  
pation of  
Crown lands  
in the Colony.  
*C. and B.*

having been in the occupation of certain waste lands as licensees paying an annual rent, obtained from the Governor a license in writing to occupy the same for one year and no longer, subject also to the reserved right of the Crown, to sell or proclaim any portion of such lands, as a gold-field common, without compensation for the loss of enjoyment to the licensee :—

*Held*, upon a sale being made by the Crown of a portion of such lands after proclamation, and the expiration of the tenancy for the year, that the Crown had, under the terms of the licenses, as also upon the construction of the Colonial Acts, an indefeasible title to such lands, notwithstanding the previous and subsequent occupation by the licensees, and payment of rent by them, which, under the circumstances, did not constitute a tenancy from year to year, or give the Licensee any title to the lands in question.

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had been in the occupation of **certain** Crown lands, known as the *Maiden Hills*, and *Lamplough* runs. Of these, the *Lamp* contained about 17,380 acres.

There was not, before the year 1861, *nor* passing, in the year 1862, of the Colonial A *Vict.*, No. 145, called the Land Act, any le provision for granting licenses to occupy for purposes the unsettled Crown lands of the Co.

The sale of such lands was provided for Imperial Act, 5th & 6th *Vict.* c. 36, whic amended by the Imperial Act, 9th & 10th I 104. Section 1 of this latter Act provided, t should be lawful for Her Majesty to demise for term, not exceeding fourteen years, any waste l of the Crown in the Colony, or to grant to anype or persons a license for occupation, for any term exceeding fourteen years, any such waste lands. 6th section of this Act gave authority to Her Maje by any Order in Council to make and establish ru and regulations respecting such licenses or demise Various Orders in Council were made under th authority of this enactment, having reference to th grant of leases, but not applying to licenses to occup for pastoral purposes.

By the Imperial Act, 18th & 19th *Vict.* c. 55, generally known in the Colony as "The Constitution Act," the Legislature of the Colony of *Victoria* as now subsisting, was established, and by the Imperial Act of the 18th & 19th *Vict.* c. 56, the Acts, 5th & 6th *Vict.* c. 36, and 9th & 10th *Vict.* c. 104, were repealed; and it was enacted, amongst other things, in substance, by section 4, that it should be lawful for the Legislature of the Colony of *Victoria* to repeal,

alter or amend any Order in Council made under the authority of the 9th & 10th *Vict.* c. 104, and that until so repealed, and subject to any such alteration or amendment, every such Order in Council should remain in force.

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Various licenses to occupy the unsettled Crown lands in the Colony for pastoral purposes had been, for some years previous to 1861, granted from time to time, by the Government. According to the custom prevailing at the commencement of that year, the licensees of Crown lands paid an annual license fee of at least £10, and if the lands occupied exceeded a given area, or were capable of depasturing more than a given quantity of sheep and cattle, the license fee was increased in proportion.

The lands in question comprised in the *Lamplough* run, were thus held by the predecessors of the Respondents, from whom they derived title.

On the 18th of *September*, 1860, the Act, 24th *Vict.* No. 117, entitled "An Act for regulating the sale of Crown lands, and for other purposes," was passed by the Colonial Legislature. By the 71st section of that Act it was provided that the Governor in Council might proclaim that any Crown lands in the vicinity of any gold-field, should be a common for the use of all holders of miners' rights, business licenses, and carriers' licenses, and other residents on such gold-field, and every such holder or other resident should from the time of such proclamation be entitled to depasture his horses and cattle on such common, subject to the rules and regulations thereafter mentioned, and that such common should be called a "gold-fields common." By section 77 the Governor was empowered (*inter alia*) at any time to



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increase, diminish, alter or abolish any gold-fields common.

By a Proclamation, dated the 28th of *January*, 1861, and published in the *Victoria* Government Gazette of the 5th of *February*, 1861, reciting and professing to be made in pursuance of the last-mentioned Act, the Governor of the Colony proclaimed certain Crown lands in the vicinity of the gold-fields thereafter mentioned, which included portions of the *Lamplough* run, to be a gold-fields common within the meaning of the Act.

At the time of the Proclamation, the Respondents, *Clough* and *Bogg*, were in occupation of the whole of the *Lamplough* run, and continued after the proclamation to occupy the residue not included in the gold-fields common, together with *Woodstock* and *Maiden Hill* run previously occupied by them. Up to this period no lease had been granted of the *Lamplough* or other runs, the Respondents and their predecessors, holding only under annual licenses, granted under the provision of the before-mentioned Acts and Orders in Council. It appeared, however, that an application for a lease had been made by one of the Respondents' predecessors, under an Order in Council of the 9th of *March*, 1847 (which was one of the Orders made pursuant to the 9th & 10th of *Vict.* c. 36), but no such lease was granted.

On the 20th of *March*, 1862, the Respondents, *Clough* and *Bogg*, having made application for the license to occupy the *Lamplough* run, a license under the hand of the Governor was made to them in the following terms:—

“License to occupy waste lands of the Crown, by his Excellency the Governor of *Victoria*, &c.

"Whereas *T. H. Clough & Co.* have made application for a License to occupy waste lands of the Crown, situate in the district of *Castlemaine*, and known as *Lamplough*. Now I, the Governor aforesaid, do hereby authorize the said *T. H. Clough & Co.*, upon payment by them of the sum of £10 sterling into the hands of the Receiver at *Melbourne*, on or before the 31st day of *March* next, and, upon the due acknowledgment of such payment here made by the said Receiver, to occupy the said waste lands for the term hereinafter mentioned. Upon the issue of this License by the said Receiver, the same is to operate and be in force from the 1st day of *January*, 1862, until the 31st day of *December*, 1862, and no longer.

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"Given under my hand at *Melbourne, Victoria*, this 20th day of *March*, A.D. 1862.

"*Henry Barkly.*

"N.B.—Although the above-mentioned waste lands of the Crown are described as being known as *Lamplough*, yet it is to be understood that no right is hereby granted to occupy land merely because such land may have been at some time heretofore known or described as *Lamplough*, and this License will not authorize the said *T. H. Clough & Co.* to occupy any land which is now, or which may formerly have been known as forming part of such run, but which shall be or may have been lawfully taken away from such run, by or on behalf of the Crown, or the Board of Land and Works, by alienation or otherwise, howsoever; and the said *T. H. Clough & Co.* shall not be entitled to any compensation, or to a return of any portion of the above-mentioned sum, if any portion of the above-mentioned waste lands of the Crown shall hereafter be alienated, or be otherwise lawfully dealt with

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by the Crown, or the Board of Land and Works ; or if the said *T. H. Clough & Co.* shall be deprived of the enjoyment of any portion of such lands by reason of the same being proclaimed a common, or by reason of any other lawful act to be done on behalf of the Crown, or by the Board of Land and Works."

"Received the above sum £10, *per* Receiver.

"*A. S. Thomson.*

"Treasury, *Melbourne*, March 31, 1862."

Previous to the issuing of this license, and on the 31st of *December*, 1861, *Clough* and *Bogg* had paid to the Paymaster at the Treasury the sum of £99.10s.8d., a portion of which was for assessment on stock depastured on *Lamplough* station for the second half-year of 1861. And on the 30th of *June*, 1862, they paid the sum of £329.11s. 8d. to the same Officer, a portion of which was assessment on stock depastured on *Lamplough* station for the first half-year of 1862.

On the 18th of *June*, 1862, the Colonial Act, 25th *Vict.* No. 145, entitled an "Act to consolidate and amend the laws relating to the sale and occupation of Crown lands," was passed. By the first section certain Colonial Acts, including the 24th *Vict.* No. 117, and all Orders in Council, and regulations respecting the sale or other disposal of the waste lands of the Crown in force in *Victoria* at the time of the passing of that Act, were repealed, saving, however, all estates, rights, and interests created or existing under or by virtue of the Act, 24th *Vict.* No. 117. The Act No. 145 was divided into parts. Part I., sections 1 to 11, was the introductory. Part II., sections 12 to 46, provided for the sale of Crown lands, which were to be made under the direction of the Board of Land and

Works. Part III., sections 47 to 62, provided for Leases and Licenses for other than agricultural purposes. Part IV., sections 63 to 79, related to commons. Section 63 saved (except as in the Act provided) all commons proclaimed under the Act, 24th *Vict.* No. 117, and the rights of any person entitled under the authority of the last-mentioned Act to depasture his horses or cattle upon any such common. Section 65 gave the Governor in Council power in certain cases to proclaim lands to be a municipal common, or a gold-fields common, or a town common, or a farmers' common, as the case might be; section 67 reserved the rights of commonage to all persons resident on the lands so selected to be proclaimed. Section 77 provided, that nothing therein contained should prevent the sale by auction, or selection, or the leasing under that Act, of any land comprised in any common proclaimed, or subject to Licenses granted as aforesaid, before or after the passing of that Act; and the Governor in Council might at any time increase, diminish, alter, or abolish any such common. Part V., from section 80 to 121, related to "Licenses for pastoral occupation," section 80 providing that yearly Licenses as to existing runs should be issued to confer no greater privileges than previous pastoral Licenses conferred, while sections 81 to 87 contained specific provisions for the payment and assessment of the rents, and for ascertaining the grazing capabilities of the runs, which were to be fixed and determined on by the Board of Land and Works, in manner and form therein particularly provided; and when so determined, to be conclusive unless appealed against.

In pursuance of these provisions, the Board of Land and Works proceeded to determine the grazing

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capabilities of each of the four classes of runs into which the pastoral lands of the Colony were directed to be divided, and published, as required by the Act, in the *Victoria Government Gazette* of the 10th of *December*, 1862, the amount of rent to be paid in respect of such runs.

The area of the *Lamplough* run was treated as 1,500 acres, and the annual rent was fixed at £25. There was no appeal against the determination of rent for the *Lamplough* run, and the annual rent so determined was duly paid in respect thereof.

On the 4th of *March*, 1863, the Respondent, *Dallimore*, and one *Charles Forster* purchased of the Respondents, *Clough* and *Bogg*, all their right, title, and interest to depasture stock on the *Woodstock* stations or runs, which, in the contract of purchase, were stated to include the stations or runs then known as *Lamplough*, *Maiden Hill*, *Woodstock*, *Lansdown*, and *Knighton*, as the same were then held and occupied by *Clough* and *Bogg* under depasturing Licenses from the Crown, standing in the names of the last-named Respondents, together with the benefit of the Licenses. It was by such contract provided that the boundaries of the runs should be as stated in the *Government Gazette*, except such portions as might have been deducted for commonage, sales, or reserves.

The benefit of this contract became, by an agreement between the parties, dated the 4th of *March*, 1863, vested in the Respondent, *Dallimore*, alone.

By a Proclamation dated the 26th of *October*, 1863, the Governor of the Colony, in pursuance of the power given him by the "Land Act, 1862," abolished the gold-fields common described, among others, in the Proclamation of the 28th of *January*, 1861, under the

designation of *Lamplough*, and declared that the area therein described and marked as containing 3,600 acres should be and constitute the gold-fields common for *Lamplough*.

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Notwithstanding that the original gold-fields common was thus abolished, the rents paid by the Respondents in respect of *Lamplough* run remained the same as before such abolition. But no fresh license for occupation was granted to them.

On the 31st of *December*, 1863, the Board of Land and Works, in pursuance of the 98th section of the "Land Act, 1862," No. 145, exposed to sale by auction, in lots, divers unoccupied Crown lands, including those in question in this appeal. The northernmost portion of the *Lamplough* run containing 3,580 acres formed lot 2, and was put up for sale by the name and description of *Lamplough* A run, the amount of rent determined for the same being £50. This lot was sold to *Ambrose Bowles*, at a premium of £75. The southernmost portion of the same run, containing 5,500 acres, formed lot 3, and was exposed for sale by the name of *Lamplough* B run, the amount of rent determined for the same being £85. This was sold to *Daniel Noonan*, at a premium of £151.

*Chauncey*, one of the Officers of the Board of Land and Works, was instructed by the Board to put *Bowles* and *Noonan* in possession of the runs purchased by them. He accordingly met them by appointment on the land, and formally gave them possession. A Shepherd of the Respondent, *Dallimore*, was at the time in possession of both the purchased runs, on behalf of the Respondent, and refused to give up such possession.

On the 30th of *March*, 1864, *Chauncey*, as such

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Agent of the Board, made a demand on *Dallimore* personally for possession of the lands in question for the above purchasers. He refused, however, to give up possession; whereupon the Appellant, on the 13th of *April*, 1864, brought an action of ejectment in the Supreme Court of the Colony, against the Respondent, *Dallimore*, for the two portions of *Lamplough* run, known as *Lamplough A* run, and *Lamplough B* run.

On the 7th of *June*, 1864, the Respondents, *Clough* and *Bogg*, obtained leave to appear to the action, as landlords of the Respondent, *Dallimore*, and defend the property sought to be recovered.

The action was tried before Mr. Justice *Williams* and a jury, and a verdict was returned for the Appellant, with one shilling damages, leave being reserved to the Respondents to move to enter a verdict for them on the grounds appearing on the Judge's notes of the evidence given.

On the 24th of *June*, 1864, the Respondents obtained a rule *nisi* to set aside the verdict for the Appellant, and to enter a verdict for the Respondents on the grounds, first, that the right of entry was not in the Crown, but in *Bowles* and *Noonan*. Second, that the Proclamation of the common did not determine the possession of the Defendant, or if it did, the revocation of such Proclamation reverted the possession in the former Licensees. Third, that the Crown had no power, under the 98th section of the Land Act, 1862, to dispose of the lands to *Bowles* and *Noonan* in the manner proved at the trial. Fourth, that no demand of possession was proved, the demand itself being insufficient, and no authority to make the demand was proved. Fifth, that, as Licenses to occupy the land from 1847 to 1863, continuously, and par-

ticularly for the year 1861, were issued, the 71st section of the Act, 24th *Vict.* No. 117, did not apply to the *Lamplough* run, but only to unoccupied Crown lands, or, if it did so apply, that the Licensee was as much entitled to occupy the land as the Commoners. Sixth, that the Order in Council of the 9th of *March*, 1847, coupled with possession and payment of license fees, and rent, and recognition, from time to time, by the Crown and its Officers, established a tenancy, and that such tenancy had not been determined.

The rule *nisi* was argued before the Supreme Court, and judgment having been given for the Respondents on the 10th of *September*, 1864, was then made absolute.

The Appellant applied for, and obtained, leave to appeal from this judgment.

The Attorney-General (Sir *R. Palmer*), Sir *Hugh Cairns*, Q.C., and Mr. *Kekewich*, for the Appellant:—

The question at issue, though seemingly involved, is simply one of tenure. The Respondents derive their original title, if they have any beyond that confined by the License of the 20th of *March*, 1862, from the occupation of their predecessors as Licensees under the Crown, of lands forming part of a run in the unsettled district called *Lamplough*. It is not pretended that there has been any sale of these lands under the provisions of the Imperial Acts, the 5th & 6th *Vict.* c. 36, or the 9th & 10th *Vict.* c. 104, or, in fact, any lease under the Order in Council made pursuant to the last-named Act, though it is said that a lease had been applied for by one of the Respondents' predecessors. Be this as it may, the question would still remain,

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what claim such occupier had to the grant of a Lease, even if applying for it, and that is not sufficiently before the Court to require argument, for both these Acts were repealed, while the Orders in Council made under them were made subject to future amendments and alterations by "The Constitution Act", 18th & 19th *Vict.* c. 55. Now, it was in this state of things that the Respondents or their predecessors were in occupation of the lands in question as Licensees of the Crown. Then came the Colonial Act, 24th *Vict.* No. 117, for the sale of Crown lands, and the Proclamation of gold-fields commons, and the due proclamation of the *Lamplough* run, notwithstanding its occupation by the Licensees as such, who continued to hold the residue with the other lands occupied by them. It was after this Proclamation that the Respondents, *Clough* and *Bogg*, applied for and obtained the License of the 20th of *March*, 1862, which by the terms of it is limited to one year and no longer; and besides being so limited by the memorandum appended to it, so much only of the original *Lamplough* run as remained after the gold-field Proclamation, was subject to future appropriations by the Crown or Board of Land Revenue. Then came the Act, 25th *Vict.* No. 145, with all its special provisions to be found in the sections under Parts 1, 2, 3, 4, and 5.

Notwithstanding these various dealings by the Crown and its Officers with the lands so occupied by the Respondents, they continue in the occupation and treat their possession as if it was a valid and subsisting title, by parting with it to the Respondent, *Dallimore*. They obtain, however, no renewal of the License of *March*, 1862, and must, therefore, be held to be but tenants on sufferance. But the Proclama-

tion of the 26th of *October*, 1863, which abolished the previous gold-fields common, and constituted one for *Lamplough*, put an end at once to the Defendants' right of possession. We say, then, that the Crown was, throughout these proceedings, and is now, the owner of the lands in question, and on the true construction of the Acts, was entitled to dispose of them in the manner stated, having, before the commencement of the action, done all things necessary to entitle it to recover possession of such lands.

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Mr. *Bovill*, Q.C., Mr. *Cotton*, and Mr. *A. K. Stephenson*, for the Respondents.

At the time of the agreement for transfer by the Respondents, *Clough* and *Bogg*, to *Dallimore*, they were in licensed occupation of the land mentioned in the writ, which they, or their predecessors, had held anterior to and in the year 1861. Their title, therefore, was transferred to the Respondent, *Dallimore*, who, at the date of the writ of ejectment, was in the lawful possession and occupation of the land in question. We maintain that the Crown had no power to determine the tenancy of the Respondents by Proclamation, and never intended to do so. The Proclamation for making the *Lamplough* run a gold-fields common had no such effect. That is evident from the continued occupation of the Respondents, and the License subsequently granted to them. There never was any due revocation of the occupancy of *Clough* and *Bogg*, who, by the payment and acceptance of rent, as well as under the general lease of their Licenses, were at the least tenants from year to year. The Order in Council of *March*, 1847, gave the Licensees a claim to a lease of the lands with a right

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of renewal and preemption, and that until the 31st of December, 1870.

Though the Act, 24th *Vict.* No. 117, section 71, under which the Proclamation issued, which is the foundation of the Appellant's title, empowers the Governor in Council to proclaim Crown lands in the vicinity of a gold-field as a gold-fields common, and by section 77 to diminish, alter, or abolish such common, it contains no reference whatever to licensed occupants; their title remained, therefore, untouched. No lands in pastoral occupation of a licensed occupier could be legally proclaimed as a gold-field common within the meaning of the 71st section of the 24th *Vict.* No. 117. Now, the lands mentioned in the writ were not unoccupied Crown lands within the meaning of the Colonial Act; they were in the pastoral occupation of the Respondents, and the attempted sale by auction of them was illegal and void. But independent of the licensed occupation, which would of itself create a yearly tenancy, the Respondents had, by virtue of such tenancy under the provisions of the Order in Council of *March*, 1847, a right to a lease for years of the lands, and such right had been transmitted to them by the previous occupants, the original Licensees. The Crown had no right to sell any lands but waste lands. The judgment of the Court below proceeded on the correct construction of the various Acts and Orders in Council, and must be affirmed.

21st Dec.  
 1865.

Their Lordships' judgment was delivered by  
 Sir EDWARD V. WILLIAMS:—

In this case the principal question argued by Counsel before us, and considered in the judgment of

the Court below, was, what effect the Proclamation of *January* 28th, 1861, whereby a portion of the *Lamplough* run was proclaimed a gold-field common under the Colonial Act, 24th *Vict.* No. 117, had on the then existing right to occupy the run. On the part of the Appellant it was contended that the effect of the Proclamation was to take away absolutely the space proclaimed a common from the run, and so to diminish its area to that extent, at the same time determining absolutely all title, legal or equitable, of the Respondents, and those under whom they claim thereto. On the part of the Respondents the contention was that the effect of the Proclamation was merely to subject the run to the servitude of the rights of common enumerated in the Statute by which the proclamation was authorized, and that, subject to such servitude, the rights of the occupier continued to exist undiminished over the whole run.

But in the view we take of the case, it is not necessary to decide this question.

It is plain that neither the Respondents, *Clough* and *Bogg*, nor the Respondent, *Dallimore*, who claims under them, had any rights, legal or equitable, as Licensees, at the time this suit was commenced; for the last License obtained by *Clough* and *Bogg* was dated on the 25th of *March*, 1862, and it mentions expressly that it is to operate and be in force from the 1st of *January*, 1862, until the 31st of *December*, 1862, and no longer.

But the Respondents claim as tenants, and that claim is founded on two subsequent payments of rent, the one on *September* 28th, 1863, for rent due 30th of *June*, 1863, and the other on *December* 31st, 1863, for rent due on that day, which payments were

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accepted as rent on behalf of the Appellant, and, having been so accepted, constituted, as it was contended, a tenancy from year to year.

It cannot be disputed that payment and acceptance of rent will furnish a sufficient evidence of a tenancy; but it is plain that such tenancy can only be thus implied with regard to the land in respect of which the rent is paid and accepted, and cannot be implied with regard to any land in respect of which the rent was not paid and accepted. It follows, therefore, that if it appears that the rent in question was not paid and accepted in respect of any part of the land which formed that portion of the run over which the common was proclaimed, no tenancy could be constituted by such payment of rent as to any part of that land.

If the rent paid after the License had ceased to operate had been paid without anything having occurred but the substitution of the payment of rent for the obtaining a new License, it would, perhaps, follow that the implied tenancy ought to be regarded as co-extensive with the whole area to which the License extended, and it would then have been necessary to construe the License—which License was in the terms already stated.

On the part of the Crown the contention was, that the terms of the notice excluded the land which had been proclaimed a common from the right granted by the License, because such land had been “lawfully taken away” from the run. On the part of the Respondents it was contended, that the concluding part of the notice treats the deprivation of the right of enjoyment of any portion of the land, by reason of the same being proclaimed a common, as a distinct thing

from the being "lawfully taken away" mentioned in the earlier part, and indicates that such land is not to be considered as excluded from the right granted by the License, but only as deteriorated in value, so as to entitle the occupier to a compensation but for the provision contained in it.

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It is not necessary, we think, to decide this point, because the extent of the implied tenancy is ascertainable, in our judgment, by reference to matters independent of the License, and which occurred subsequently to its expiration.

The subsequent matters arose out of the exercise by the Board of Works of the powers conferred under sections 84, 85, 86, and 87 of the Land Act, 1862, 25th *Vict.* No. 145.

By those enactments rents are substituted for the former assessments of stock depastured on the runs, such rent to be paid according to the grazing capabilities of the run, to be determined by the Board, and when they have been so determined, the Board is directed to cause to be inserted in the Government Gazette a notice of the amount of rent to be paid, in the form mentioned in one of the schedules of the Act, and the amount there mentioned is to be binding and conclusive, unless the occupier shall within two months of the publication send a notice of appeal. The form given by the seventh schedule consists of several columns, in one of which the area of the run is to be inserted, in another the grazing capabilities of the run, in another the annual rent, and in another the quantity of stock depastured on the run in 1861, and the last column is headed "general observations." Accordingly, on the 10th of *December*, 1862, the Board having determined the grazing capabilities of

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*Lamplough* run, published in a supplement to the *Victoria* Government Gazette, the amount of rent, in a schedule framed in accordance with the Act; and in that schedule, *Lamplough* run was stated to have an area of 1,500 acres, with a grazing capability of 750 sheep. The rent was fixed at £25. The quantity of stock depastured on the run in 1861 was stated at 5,972, and in the columns for "general observations" there was an entry, "area diminished by sale and commonage."

It is probable that this schedule was intended to be framed in conformity with the License of 1862, according to the Appellant's construction of it. At all events, we cannot doubt that the payments of rent, which are relied on as establishing the tenancy, were made and accepted on the footing of the statements contained in the schedule. The amounts paid corresponded with the rent fixed, for although the receipt for the payment made in *December*, 1863, shows that £78. 6s. 8d. was paid for the half year, yet it is satisfactorily shown by the evidence that this sum was composed of £12. 10s., the half-year's rent mentioned in the schedule, with an augmentation of £53. 6s. 8d., in respect of the southern part of the run which had not been considered in the first instance to belong to the *Lamplough* run. And the amount paid for the earlier half-year's rent is £12. 10s.

If this be so, it is plain that the payments of rent were made for the run, exclusively of the land in question in this cause. And the result is, that no tenancy was established in respect of it; but that as soon as the Respondents assented to become tenants of the diminished area only, all title to the land in question ceased, both at law and in equity, and they

became merely tenants at sufferance of it, supposing them to have had a right to hold it up to that time ; and, consequently, no notice to quit or demand of possession was requisite.

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The judgment in the Court below assumes that the occupation, as Licensees and tenants of the run, continued all along to be of the same dimension, and does not advert to the facts which, in our opinion, show that the tenancy, if established, was of a diminished area, so as to exclude the land in question.

For these reasons, their Lordships think they ought to advise Her Majesty to reverse that judgment, with costs, and that the verdict found for the Appellant ought to stand.

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ON APPEAL FROM VICTORIA. (INSOL-  
VENCY JURISDICTION.)

GEORGE ROLFE AND EDWARD BAILEY, }  
AND } *Appellants,*  
THE BANK OF AUSTRALASIA - - }  
AND  
FLOWER, SALTING & COMPANY - *Respondents.\**

THESE were two appeals arising out of the insolvency, and regarding the estate of *William Rutledge*, *Horace Flower*, and *Francis Forster* (trading under the firm of *William Rutledge & Co.*), of *Belfast*, in

9th, 11th,  
12th, & 13th  
Dec. 1865.  
Feb. 1, 1866.

\* Present: Lord Chelmsford, Sir John Taylor Coleridge, Sir James W. Colville, and Sir Edward Vaughan Williams.

*R., F., and  
R., partners  
in business,  
and dealing  
with F., S.,  
& Co., took T.  
and S., Clerks*

in their employment, into partnership with them. The partnership was constituted by deed, to continue for three years, and a balance sheet showing the liabilities and assets of the existing firm was



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the Colony of *Victoria*. The first was an appeal from a judgment of the Supreme Court delivered in the matter of the insolvency of *William Rutledge & Co.* The application in that Court, from the refusal of which the appeal was brought, being, in substance, that a proof by the Respondents, *Flower, Salting & Co.*, against the estate of *Rutledge & Co.*, for a sum exceeding £50,000, might be expunged.

The Appellants, *Rolfe and Bailey*, who were cre-

drawn up and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm—no distinction being made in their payments or balances, or between the debts or assets of the new, or what was the old firm. *F., S. & Co.* continued to deal with the new as they had done with the old firm. *R., F., and R.* having become insolvent, *F., S. & Co.*, creditors to a large amount, proved against the estate of the new firm. *R. and B.*, also creditors of the new firm, proved against their estate; and sought to expunge the proof of *F., S. & Co.*, on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, and not from the new firm:—

*Held*, by the Judicial Committee (affirming the judgment of the Supreme Court), that there was sufficient proof in the dealings and transactions of the several parties, to show that the new firm on its formation adopted the liabilities of the old firm, and that *F., S. & Co.*, had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors.

The Act, 5th of *Vict.* No. 17 (the principal Insolvent Act of the Colony of *Victoria*), sec. 39, enacts, "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate, shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition; and when he is not the petitioning creditor, in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction."

*Held*, that this enactment does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor, holding a mortgage security on the separate estate, to estimate and deduct its value before he can be allowed to prove against the joint estate.

The English law of Bankruptcy which allows a joint creditor, though holding a security on the separate estate, to prove against the joint estate without giving up his security, prevails in the Colony of *Victoria*, and is not altered or varied by the Insolvent Acts of that Colony.

ditors to a considerable amount of the late firm of *Rutledge & Co.*, insisted that it ought to be expunged, on the ground that it was not a debt of the firm, but a separate debt of two only of the three partners of the firm.

In the second case, the Appellants, the Bank of *Australasia*, who were creditors to a very large amount of the late firm of *Rutledge & Co.*, insisted that as the Respondents, *Flower, Salting & Co.*, held securities for their debt on the real estate of one of the partners, and made no deduction from the amount which they claimed in respect of the value of these securities, the proof which they tendered was wholly irregular and inadmissible.

The Respondents were traders at *Sydney, New South Wales*, under the style or firm of *Flower, Salting & Co.*, and at *Melbourne*, under the firm of *Flower, Macdonald & Co.* They were also traders in *London*, under the firm of *P. W. Flower & Co.* All the three firms consisted of the same partners, though trading in different places, and bearing different names.

In both cases the questions were raised by the Appellants respectively, and were throughout severally contested between them and the Respondents, *Flower* and *Salting*, exclusively, without any intervention on the part of the Official Assignee, though he was named as a formal party in the proceedings below.

The firm of *W. Rutledge & Co.* carried on business at *Belfast* in the Colony of *Victoria*. The founders and original members of it were *William Rutledge* and *Horace Flower*; *Lloyd Rutledge* afterwards became a member of the firm; he died in the year 1858, and

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the firm, until 1859, consisted only of the two original members. On the 7th of *April*, 1859, the then members of the firm agreed to admit two new partners, *D. Talbot* and *F. Forster*, who had both been and then were Clerks of the firm, and both of whom were admitted as from the 7th of *April*, 1859, to the 1st of *July* then next ensuing, and thenceforth for a period of three years.

This partnership was created by a deed bearing date the 7th of *April*, 1859; by which it was declared that the partnership should commence from the date thereof, but that neither *D. Talbot* nor *F. Forster* should "be entitled to any share of the profits, or be subject to any losses connected with the partnership from the day of the date thereof until the 1st of *July* then next." On the 30th of *June*, 1859, a balance-sheet was drawn out, showing the position of the firm at that date; by which an excess of assets over the liabilities appeared, which was treated as capital belonging to *W. Rutledge* and *H. Flower*, in certain ascertained proportions, which were separately placed to their respective credits. Neither *D. Talbot* nor *F. Forster* brought in any capital.

Upon the complete constitution of the new partnership, all the assets and liabilities of the old firm were, with the consent of all the partners, transferred to and assumed by the new firm, with the exception that by the 18th article of the deed of partnership it was declared, that in taking the yearly accounts of the partnership "the said *D. Talbot* and *F. Forster* should not be debited or credited with any loss or gain connected with any freehold or leasehold property belonging to or held by *W. Rutledge* and *H. Flower* as security." No new Books were opened by

the new firm, but the accounts were continued in the old Books in the same manner as they would have been if no change had been made in the members of the firm, and the Respondents, who were well aware of the change in the firm, continued to deal with the new firm as they had done with the old one.

It appeared that previous to and pending these arrangements, *W. Rutledge* had by a deed, dated the 25th of *September*, 1857, and by another deed dated the 30th of *June*, 1859, mortgaged certain freehold estates which were his private property to the Respondents as a security to them for the debt due from *W. Rutledge & Co.*

*Talbot* died in *February*, 1862; and the firm of *William Rutledge & Co.* from that time until its insolvency, consisted of the three surviving partners.

In the month of *April*, 1862, *William Rutledge & Co.* stopped payment; and on the 4th of *June*, 1862, an order was made by a Judge of the Supreme Court, on the petition of *W. Rutledge*, *H. Flower*, and *F. Forster* (the three existing members of the firm), by which order the Court accepted the surrender of the joint estate of the firm for the benefit of their creditors.

The Insolvents filed a joint schedule, to the truth of which they all deposed, and from which it appeared that they were indebted to the Respondents, Messrs. *Flower & Salting*, for merchandize, in a sum exceeding £50,000, without security on the Insolvents' estate, but secured on the private estate of *W. Rutledge*; and to the Appellants, the Bank of *Australasia*, for advances made by them, in a sum exceeding £30,000.

The first meeting under the insolvency was held at

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*Geelong* on the 9th of *July*, 1862. At that meeting, the Respondents tendered a proof against the estate for £53,587. 10s. 10d.

It was contended by the Appellants, the Bank of *Australasia*, who had proved at the same meeting for the sum of £30,249. 18s., that the Respondents were, according to the Acts and Ordinances relating to insolvency in force in the Colony, bound to set off against, and deduct from, their proof the value of the before-mentioned mortgage securities which they held against the separate estate of *W. Rutledge*.

The Commissioner before whom the meeting was held considered the contention valid, and required the Respondents to value their debt accordingly. The Respondents refused to do this, and the Commissioner thereupon for the purpose of enabling them to bring the question before a Court of appeal, rejected the proof altogether.

On the 25th of *July*, 1862, the Respondents' appeal from the Commissioner's decision was heard before Mr. Justice *Chapman*, who held that they were not bound to value their security, and accordingly admitted the proof. The Appellants, the Bank of *Australasia*, appealed to the Supreme Court from this decision.

The case was argued at length before the Chief Justice, Sir *William Foster Stawell*, Mr. Justice *Molworth*, and Mr. Justice *Chapman*, who, by an order of the 24th of *September*, 1862, dismissed the appeal, without costs. Against this Order the Bank of *Australasia* appealed to Her Majesty in Council.

On the 1st of *August*, 1862, the Appellants, *Rolfe & Bailey*, who carried on business as Merchants at *Melbourne*, in the Colony of *Victoria*, under the firm

of *Rolfe & Bailey*, proved against the insolvent estate two debts, amounting in the aggregate to £288. 13s. 2d.

The Appellants, *Rolfe* and *Bailey*, alleging that the Respondents were not creditors of the firm of *W. Rutledge & Co.*, the joint estate of which was being administered under the insolvency, applied on the 11th of *December*, 1862, before Mr. Justice *Chapman*, for, and obtained, a rule *nisi* to expunge the Respondents' proof, on the ground that their alleged debt was not a joint debt of all the partners in the firm of *W. Rutledge & Co.*, but in fact a separate debt of *W. Rutledge* and *H. Flower*, for which *Forster*, their partner in the firm, was in no ways liable. In support of their application to expunge the Respondents' proof, the Appellants filed an affidavit made by *Forster*, one of the Insolvents, to show that on the 1st of *July*, when he and *Talbot* (both then Clerks of the firm, as before stated) became partners in the firm of *W. Rutledge & Co.*, a debt of much more than £80,000 was due from *W. Rutledge* and *H. Flower* (the then partners) to the Respondents, under one or other of the names under which the Respondents traded; and that they (*Forster* and *Talbot*) became partners under, as they alleged, a distinct agreement between themselves on the one hand, and *W. Rutledge* and *H. Flower* on the other, that the debt to the Respondents was to remain exclusively the debt of the latter two persons. The affidavit in question further affirmed that *F. Forster*, while a partner in the firm, had done nothing whatever to make himself liable to the debt so due to the Respondents, either as between himself and the Respondents, or as between himself and his partners.

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The Respondents filed affidavits in opposition to the Appellants' application, the purport of which was to establish, first, that according to the articles of partnership under which *Talbot* and *Forster* were admitted into the firm of *W. Rutledge & Co.*, *F. Forster* had, as between himself and his partners, made himself jointly liable with them for the debt which the Respondents proved; and, secondly, that *Forster* had, as between himself and the Respondents, made himself a joint debtor for it to the Respondents with the other partners in the firm constituted in 1859.

In answer to this evidence, affidavits were filed by the Appellants and by the Insolvent, *Forster*, in support of the Respondents' claim on the separate estate of *Rutledge & Co.*

The evidence was conflicting; and is stated and commented on, so far as is requisite for the decision of the case in the judgment of their Lordships on the appeal.

On the 2nd of *March*, 1863, Mr. Justice *Molesworth* pronounced judgment on the application made by the Appellants, Messrs. *Rolfe & Bailey*, to expunge the proof. After considering the facts of the case, he expressed his opinion that *Talbot* and *Forster* had never adopted or become liable for the debt to the Respondents, and he accordingly ordered the Respondents' proof to be expunged.

The Respondents appealed from the decision of Mr. Justice *Molesworth* to the Supreme Court of the Colony in *Banco*. On the 12th of *May*, 1863, the Supreme Court made an Order allowing the appeal, and discharging with costs the rule *nisi* to expunge the proof.

The Appellants applied for leave to appeal against the last-mentioned decision to Her Majesty in Council. On the 28th of *May*, 1863, this leave was refused by Mr. Justice *Molesworth*, on the ground that, the matter in issue being only for the sum of £288, it was not within the appealable value as declared by the Colonial Act, 15th *Vict.* No. 10, s. 33. On the 21st of *September*, 1863, the Supreme Court of *Victoria*, sitting in *Banco*, reversed the last-mentioned Order, and granted the Appellants leave to appeal to Her Majesty in Council.

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The *Attorney-General* (Sir *R. Palmer*), Mr. *Hobhouse*, Q.C., and Mr. *Wickens*, for the Appellants in both cases :

These cases arise out of the insolvency of the firm of *Rutledge & Co.* The Appellants in either case are creditors of that firm, and have tendered and proved their respective debts. The Respondents, *Flower & Salting*, were also admitted creditors to a very large amount, and it is against their claim in fact that the proceedings in both cases are directed. The Appellants, Messrs. *Rolfe & Bailey*, seeking to expunge the Respondents' debt altogether, as not due from the insolvent firm of *Rutledge, Flower & Forster*, but from the previous firm of *Rutledge & Flower* ; and the Appellants, the *Bank of Australasia*, insisting that by the law of the Colony the Respondents are bound to deduct the value of the mortgage securities held by them on the separate estate of *William Rutledge* from the debt which they claim to prove under the insolvency of *W. Rutledge & Co.* We say, therefore, first, that the debt proved by the Respondents against the estate of *William Rutledge & Co.* was in no sense a



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debt of that firm, but merely the separate and personal debt of *William Rutledge* and *Horace Flower*, two of the partners in it. They alone constituted the firm at the time the Respondents' debt was incurred. There is nothing in the partnership deed, nor in the subsequent dealings of the parties, which could render the new firm liable for the debts of the old firm; there was no novation of the old debts by *Talbot* or *Forster*. If an incoming partner chooses to make himself liable for debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing; but even if an incoming partner does agree with his co-partners that the debts of the old firm shall be taken by the new firm, this, though valid between the partners, is, as regards strangers, *res inter alios acta*, and does not confer on them any right to fix the old debts on the new partner: *Park, J.*, in *Vere v. Ashby* (a), *Ex parte Peele* (b), *Ex parte Williams* (c). These cases show, that, in order to render an incoming partner liable to the creditors of the old firm, there must be some agreement to that effect entered into between him and the creditors, and founded on some sufficient consideration. There is no pretence for saying there was any such agreement made between the creditors of the old firm and *Talbot* or *Forster*; and all the authorities show that, it is only by such an agreement, and not by reason of partners being such, that any liabilities in respect of the old debts of the firm will attach to the new partners. There must be some agreement, though it was said by Lord *Thurlow* a very little will suffice to show it, between the partners themselves and the creditors: *Ex parte Jackson* (d);

(a) 10 Bar. & Cr. 298.

(b) 6 Ves. 601.

(c) Buck. 13.

(d) 1 Ves. Jun. 131.

*Ex parte Bingham* (a) ; *Ex parte Clowes* (b) ; *Ex parte Liddiard* (c) ; an arrangement between the partners themselves is no evidence: *Ex parte Freeman* (d) The whole question, whether the estate of one of two partners who died, was after his death discharged from a partnership debt, is discussed, and all the authorities referred to in the cases of *Winter v. Innes* (e) ; and *Devaynes v. Noble* (f).

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The case then resolves itself upon the evidence to the questions, first, whether the new partners took upon themselves the joint liability for the debts of the old firm ; and, secondly, whether the creditors of the old firm agreed to accept the liability of the new for that of the old firm. Upon the facts and circumstances of the case, and looking to the whole evidence, we maintain that no such agreement was come to by either parties, and that the new firm were not liable for the debts of the old. The proof of the Respondents' debt, therefore, against the firm of *Rutledge, Flower, & Forster* was rightly expunged.

Secondly, as regards the appeal of the *Bank of Australasia*, the estate to be administered under the joint adjudication included both the joint estate of the three partners as well as the separate estate of each of them. The Respondents' proof, therefore, against the joint estate was subject to the deduction of the amount of the securities held by them against the separate estate, that was held by the Commissioner of Insolvent estates in the argument before him, and the proof tendered by them was rejected. That, we maintain, was the correct decision, and according to

- (a) Cooke's Brp. Laws, 534. (b) 2 Bro. C. C. 595.  
(c) 2 Mon. & Ayr. 87. (d) Buck. 471.  
(e) 4 My. & Cr. 101. (f) 1 Mer. 530.

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law : *Ex parte Peacock* (a) ; *Ex parte Davenport* (b) ;  
*Ex parte Shepherd* (c) ; *Ex parte Free* (d) ; and *Ex*  
*parte Hallifax* (e).

The estates are to be administered under the insolvent law of the Colony, and especially under the Act, 5th *Vict.* No. 17, passed in 1841, which contains various provisions differing from the Bankruptcy law of this country, especially in reference to the proof of joint and separate debts. The 39th section of that Act provides, that any creditor who shall have or hold any security upon any part of the insolvent estate shall be obliged to put a value upon such security, and to deduct such value from the debt proved by him ; which compels the joint creditor holding a security against the separate estate, to value such security, and prove only for the balance against the joint estate. That may be different from our law, but is the express enactment of the Colonial Act, and has no doubt been adopted for, as we contend, good and obvious reasons. The case is analogous to, and seems to have been borrowed from, the Scotch law of sequestration, where, if a creditor hold a security for his debt over the Bankrupt estate, its value must be deducted from the debt : 2nd & 3rd *Vict.* c. 41, sec. 35 ; *Burton's Law of Bankruptcy*, ch. viii. sec. 1 (581).

Sir *Hugh Cairns*, Q.C., Mr. *Mellish*, Q.C., Mr. *Pearson*, and Mr. *W. S. Salting*, for the Respondents :—

It was not competent for either of the Appellants, after the debt due to the Respondents had been finally

(a) 2 Gl. & Jam. 27.

(b) 1 M. D. & De G. 313.

(c) 2 M. D. & De G. 204.

(d) 2 Gl. & Jam. 250.

(e) 2 M. D. & De G. 544.

admitted to proof by the Order of the 24th of *July*, 1862, confirmed on appeal by that made by the Supreme Court on the 24th of *September*, to question the proof of such debt in the proceedings which they instituted for that purpose. The learned Judge of the Court below had no authority to grant the rule *nisi* for expunging the Respondents' debt at the instigation of the Appellants, *Rolfe* and *Bailey*, who proved subsequent to the admission of the proof of the Respondents. The jurisdiction of the Colonial Court is entirely dependent on legislative enactment. There is no clause in the Insolvent Acts for the Colony (the 5th *Vict.* No. 9 and No. 17; the 7th *Vict.* No. 19; the 8th *Vict.* No. 6 & No. 15; the 10th *Vict.* No. 14; and the 18th *Vict.* No. 11) giving power to expunge proofs analogous to those contained in the English Bankruptcy Acts, 6th *Geo.* 4, c. 16, sec. 60, and the 24th & 25th *Vict.* c. 134, sec. 155; and we maintain that the omission of such a clause implies that no such power exists. The 89th and following sections of the Colonial Act, 5th *Vict.* No. 17, could alone support such authority, but the proceedings here are not taken under any of those sections. Assuming, however, as the Supreme Court seems to have decided, that the learned Commissioner had jurisdiction to entertain such an application, the question resolves itself into one of evidence, whether in fact there was an agreement, tacit or expressed, by the Appellants, as creditors of Messrs. *Rutledge* & Co., to accept as their debtors the new instead of the old firm. Now, though we admit it does not follow that because there is evidence of such an agreement being made between the old and new firm themselves, such evidence necessarily leads to the conclusion that such an agreement existed

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between the creditors and the firm; yet, if the dealings of the parties have been such as to lead to the necessary inference that the creditors recognized and knew of the change of firm, their assent to such change will be implied: *Ex parte Jackson* (a), cited on the other side, is no authority against this principle, neither is *Ex parte Peele*. All the authorities relating to incoming partners, their rights and liabilities, are collected in *Lindley's Treatise on the Law of Partnership*, vol. i. pp. 314, 317, 352, and vol. ii. p. 985, where it is expressly laid down, as we maintain the law to be, namely, that the substitution of debtors can only be made with the creditors' consent.

Now, looking to the articles of partnership entered into between *Rutledge, Flower, Forster & Talbot*, the affidavits of *Forster*, the Bankrupts' books and schedules, there was abundance of evidence for the conclusion the Supreme Court came to, namely, that the Respondents adopted the new firm instead of the old, and were consequently entitled to prove their debt against that firm from which their debt was justly due to them.

Then as regards the appeal of the Bank of *Australasia*, who insist that, as we hold a separate security against the separate property of one of the partners, we must deduct the value of that security before we can be admitted to prove against the joint estate—the language of the 39th section of the Colonial insolvent Act, 5th *Vict.* No. 17, warrants no such conclusion; it speaks of securities or liens upon the insolvent estate, not upon the separate property of one of the Insolvents. Messrs. *Flower & Salting* hold no security on the joint estate of *W. Rutledge & Co.*, and never

(a) 1 Ves. Jun. 181.

pretended to hold such ; but they claimed, and are entitled to prove, for the whole debt due to them from the estate of *W. Rutledge & Co.*, against that estate, without reference to, or abatement on account of, the security they hold on the separate estate of *W. Rutledge*. The joint and separate estates are entirely distinct, and must be separately administered. The practice of the Scotch Courts has no reference to the present case ; there are no provisions in the Insolvent Acts of *Victoria* analogous to or having the same effect as the law of sequestration in *Scotland*.

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Lord CHELMSFORD :—

These are appeals from two judgments of the Supreme Court of *Victoria* in a matter of insolvency of a firm of *William Rutledge & Co.*, Merchants, carrying on business at *Belfast* in that Colony, by which the Respondents, Messrs. *Flower, Salting & Co.*, were admitted to prove against the estate of the Insolvents for a debt of £53,587 10s. 10d.

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The questions raised in the two cases were different ; but as the facts in each were the same, and both related to the same debt, they were argued together. They must now, however, receive a separate consideration.

To begin with the appeal of Messrs. *Rolfe & Bailey*. The judgment appealed from in their case was pronounced on an application by them to expunge the proof of the debt of Messrs. *Flower, Salting & Co.*, on the ground that it was not a joint debt of all the partners in the existing firm of *William Rutledge & Co.*, but a separate debt of a former partnership, carried on under the same name, but of which two

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only of the present partners, *William Rutledge* and *Horace Flower*, were members.

Their opposition involved the consideration of two questions :—

First, whether the insolvent firm of *William Rutledge & Co.* had assumed the liability to pay this debt ; and

Second, whether *Flower, Salting & Co.* had agreed to accept the insolvent firm as their debtors, and to discharge the old partnership from its liability.

The firm of *William Rutledge & Co.*, which had been for some years established in *Victoria*, originally consisted of *William Rutledge* and *Horace Flower*; *Lloyd Rutledge* afterwards became a partner, and so continued till his death in *December*, 1858. After his death the business of the firm was carried on by the two original members of it down to *April*, 1859, when the new partnership was formed.

The firm of *William Rutledge & Co.* had for many years large transactions with the Respondents, who carried on business as Merchants in *London*, *Sydney*, and *Melbourne* ; in *London*, under the firm of *P. W. Flower & Co.* ; in *Sydney*, of *Flower, Salting & Co.* ; and in *Melbourne*, of *Flower, Macdonald & Co.* At the time of the formation of the new partnership in *April*, 1859, the firm of *William Rutledge & Co.* were indebted to the Respondents' three firms in sums amounting in the whole to £113,710. 10s. 7d.

The new firm of *William Rutledge & Co.* was formed by admitting two new partners, *David Talbot* and *Francis Forster*. *Talbot* and *Forster* were both of them Clerks to *William Rutledge & Co.* *Forster* had been in the employment of the firm for four years, and was admitted to the partnership, in pursuance of

an agreement with *William Rutledge*, when he became his Clerk, that at the expiration of the then existing partnership (which had about four years to run) he should be taken in as a partner. Before the partnership deed was executed, a balance-sheet was drawn up, principally by *Talbot* and *Forster*, showing the liabilities and assets of the firm on the 30th of *June*, 1858. Amongst the liabilities the before-mentioned debts to the Respondents' firms were inserted. In an affidavit made by *William Rutledge*, in the insolvency proceedings, he stated that this balance-sheet was the one on the basis of which *Talbot* and *Forster* entered the firm.

On the 7th of *April*, 1859, the deed of partnership was executed between *William Rutledge*, *Horace Flower*, *David Talbot*, and *Francis Forster*, by which they agreed to become and continue partners from the day of the date thereof until the 1st of *July* then next, and thenceforth for the term of three years. By the fourth article of the deed, it was provided "that neither the said *David Talbot* nor *Francis Forster* should be entitled to any share of the profits, or be subject to any losses connected with the partnership, from the day of the date thereof until the 1st day of *July* next." The object of thus postponing the complete admission of *Talbot* and *Forster* to the partnership was, apparently, to allow stock to be taken, and a balance-sheet to be prepared, to show the position of the firm at the expiration of the then existing partnership of *W. Rutledge & Co.* Accordingly, a balance-sheet for the year ending the 30th of *June*, 1859, was drawn up. In this balance-sheet the debts due to the Respondents' firms are stated at £83,525 16s. 2d.; and the excess of the assets over

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the liabilities, amounting to £16,384. 15s. 6d., is treated as capital belonging to *Rutledge* and *Flower* respectively, £6,024. 0s. 7d. being placed under that heading to the credit of *Rutledge*, and £10,360. 14s. 11d. to the credit of *Flower*. Neither *Talbot* nor *Forster* brought any capital into the partnership.

The new firm of *W. Rutledge & Co.*, consisting of the four partners, and, after the death of *Talbot*, of the three others, continued to trade down to the time of the sequestration, in *June*, 1862. On the establishment of the new partnership, no alteration was made in the mode of carrying on the business; the accounts were continued in the old books, as if no change had taken place, and the existing liabilities were discharged or diminished, either from the assets of the old firm or from the funds of the new indiscriminately. No provision is expressly made in the partnership deed for the new firm assuming the debts of the old, nor for the assets of the old firm becoming the property of the new. Mr. Justice *Molesworth*, who reversed the decision of the Commissioner of Insolvent estates, admitting the debt of *Flower, Salting & Co.* to proof, said, "The deed being silent on the subject, we cannot on ordinary principles vary the expressed agreement by parol evidence, and say that an assumption of old debts and liabilities was part of the contract." This is not strictly accurate. Such an arrangement would be something in addition to the other terms, not inconsistent with them, and might be established either by parol evidence or by conduct.

In arguing the question as to the assumption of the liabilities of the old firm by the new, some reliance was placed upon probabilities. On one side it was

said to be most improbable that *Talbot* and *Forster* should have agreed to undertake liabilities to the large amount of £162,000, which at any moment might occasion their ruin. On the other, it was argued that nothing was more likely than that two persons who had been Clerks in the house, and who were to contribute no capital, should eagerly avail themselves of the opportunity of becoming partners upon any terms, however hazardous, in a concern which the state of the accounts showed to be on the whole a flourishing one. The question, however, is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old. Lord *Thurlow* in *Ex parte Jackson* (1 Ves. Jun. 132), said, "If one man having debts takes another into partnership with him, a very little matter respecting those debts will make both liable." And Lord *Eldon*, in *Ex parte Peele* (6 Ves. 604), thought that "slight circumstances" might be sufficient to prove an agreement to undertake such a liability. The evidence in this case, however, appears not to be slight but cogent, to fix the liabilities of the old firm upon the new. Not only was there a continuance of the former dealings of the old firm upon precisely the same footing and with the same books as before, but the liabilities of the old firm were regularly inserted in the balance-sheets of the new, and the assets of the old firm credited as belonging to the new, without any distinction between them. Large sums of money also were paid out of the general assets of the firm in reduction of the debt of *Flower, Salting & Co.*, and the interest upon their debt was

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regularly charged in the annual balance-sheets of the partnership.

It was said by the Appellants, that all that was done in payment of the debts of the old firm was in the discharge of a duty assumed by the new firm, as the agents of the old, to receive their assets and discharge their liabilities. But the course of the partnership transactions scarcely admits of this argument; for, if it were merely a case of agency, it might have been expected that these assets and liabilities would have been kept separate and distinct from the partnership business, instead of being blended and intermingled with it.

Independently, however, of the dealings and conduct of the partnership generally, there is evidence of acts and admissions of *Forster* (the only one of the insolvents who attempted to defeat the claim of *Flower, Salting & Co.* to prove under the insolvency), which is of great importance. In an affidavit made by him on the 2nd of *December*, 1862, he deposes as follows:—"In or about the months of *February* or *March*, 1859, before the execution of the deed of partnership between the said *William Rutledge*, *Horace Flower*, *David Talbot*, and myself, I had a conversation with the said *William Rutledge* relative to the debt due to *Flower, Salting & Co.*, when he told me that it was secured to that firm on his (the said *William Rutledge's*) own private property, and that I was not to be liable for it, nor for the debt of £19,000 then due to the Bank of *Australasia*." And again, "I never, directly or indirectly, agreed with the said firms of *Flower, Salting & Co.*, and *Flower, Macdonald & Co.*, or with either of them, or any

member thereof, to take upon myself the liability of the said debts so due by the said firm of *William Rutledge & Co.* to the said firms of *Flower, Salting & Co.*, and *Flower, Macdonald & Co.*, respectively, nor did I ever, directly or indirectly, authorize any or either of my partners to enter into any such agreement on my behalf."

The alleged conversation before the execution of the deed of partnership is positively denied by *Rutledge* in his affidavit of the 9th of *February*, 1863, in these terms:—"I never on any occasion, either before or after the deed of partnership was drawn up, told the said *Francis Forster* that he was not, upon entering my firm, to be liable to the debt due by my then firm, to Messrs. *Flower, Salting & Co.*, but I say that in conversing with them upon the terms of entering my firm, I explained to both the said *Francis Forster* and the said *David Talbot* that, as the new firm were to take over the whole of the assets of the old firm, they must also take all the liabilities."

The credit of *Rutledge* is sought to be impeached by the affidavit of *Edward Klingender*, of the 25th of *February*, 1863, in which he states that *William Rutledge* was examined as a witness at the second meeting under the insolvency, upon the subject of the debt due to the Bank of *Australasia*, and that he then distinctly and positively swore that "the firm of *William Rutledge & Co.*, consisting of the above-named Insolvents, and the said *David Talbot*, deceased, did not take over all the liabilities of the old firm of *Rutledge & Co.*, and that they did not take over the debt due to the Bank."

There can be no doubt that for that portion of the debt due to the *Australasian* Bank, for which they

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held security, the new firm was not liable; and *Rutledge* must have been inaccurate (to say the least) in swearing that he told *Forster* and *Talbot* that the new firm would have to take all the liabilities. On the other hand, as the new firm was not to be liable for a part of the debt of the *Australasian* Bank, it seems likely that some such conversation as that stated by *Forster* should have taken place. Whether he has not extended to the debt due to *Flower, Salting & Co.* expressions which were meant to be confined to the Bank, may in some degree be judged of by his subsequent conduct. According to the affidavit of *Horace Flower*, of the 16th of *February*, 1863, before *Forster* joined the firm, he "pointed out to him the heavy liabilities of the firm, and recommended him not to join in the partnership." *Flower's* affidavit further states, "The principal debts due by the said firm at the time I recommended the said *Francis Forster* not to join in the partnership were those due to Messrs. *Flower, Salting & Co.*, Messrs. *Flower, Macdonald & Co.*, Messrs. *P. W. Flower*, and the Bank of *Australasia*, with which debts the said *Francis Forster* was, as I believe, perfectly conversant; but the said *Francis Forster* said, that he was satisfied to join the said partnership, and did so join." *Forster* made an affidavit on the 25th of *February*, 1863, in which he answers passages in the affidavits of other persons, but takes no notice of the above statement made by *Flower*, which is wholly uncontradicted.

In addition to this evidence, there are affidavits of admissions made by *Forster*, and also proof of acts done by him, which strongly confirm the case of the Respondents.

A statement by *Rutledge* of one of these admissions is contradicted by *Forster*, and, therefore may be disregarded. But Mr. *Salting*, one of the Respondents, in an affidavit, dated the 13th of *February*, 1863, deposes to a conversation which he had with *Forster*, in 1861, upon the subject of his debt, and says:—  
 “Upon all these occasions the said *Francis Forster* invariably spoke of the said debt as due by his firm, and never in the remotest manner denied or expressed the slightest doubt of his firm’s liability in respect thereof. Upon one of these occasions, in answer to my inquiries as to his opinion of the security of our position (meaning our position as creditors of his firm), he remarked that he considered the funds of the firm sufficient to discharge their liabilities, and that in all likelihood no necessity would arise for us ever to have recourse to the security which we held upon Mr. *Rutledge’s* private estate.”

This is not denied by *Forster* in the affidavit of the 25th of *February*, 1863, to which reference has been already made, but it is almost impliedly admitted by his statement, that “any expressions he may have used respecting the said debt were not intended by him to induce the said *Severin Kanute Salting* to believe that he had taken upon him that debt.”

There is, however, one act of *Forster’s* which seems decisive of his opinion that the firm of which he was a partner were liable to pay the debt of *Flower, Salting & Co.* In the Insolvent’s schedule, to which *Forster* and his partners, *Rutledge* and *Flower*, were sworn, the names of *Flower & Co., London*, and of *Flower, Salting & Co., Sydney*, are inserted in the list of creditors, and under the column headed, “whether any security given,” is inserted, “no security on In-

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solvent's joint property, but secured on the private estate of *W. Rutledge*." Now, *Forster's* case is not that a sudden light broke in upon him as to his legal position after the filing of the schedule, but that from the first and continually down to the time of the insolvency he considered himself not to be liable for these debts. *Forster* says, indeed, that at the time of the preparation of the schedule he had no separate legal adviser, that instructions were given for it by *Rutledge*, and that he signed and swore to it, as prepared by the Solicitor, without having taken advice as to the way in which the debts due to *Flower, Salting & Co.*, and the Bank of *Australasia*, should be inserted. But this explanation can hardly be accepted, for *Forster*, upon his examination at the first meeting, under the insolvency, said, "I believe *Flower, Salting & Co.* are correctly entered in the schedule. I believe they hold security. I never saw the deed, but heard of it from Mr. *Flower*, our partner." Besides, if it be true that *Forster*, as a partner in the new firm, was not liable for these debts, the existing partnership of *W. Rutledge & Co.* was not insolvent, as the debts of *Flower, Salting & Co.*, and of the Bank of *Australasia*, amounted together to £63,000, and the deficiency of assets stated in the schedule is only £53,118. 17s. 1d. There seems to be no reasonable doubt, upon the above facts, that the insolvent partnership, at the time of its formation, assumed the debts and liabilities of the former firm of *W. Rutledge & Co.*, including the debt due to *Flower, Salting & Co.*, and the only remaining question to be considered is, whether *Flower, Salting & Co.*, being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors.

Upon this question, as upon that of the agreement of the partners *inter se*, it was said by Lord *Eldon*, in *Ex parte Williams* (Buck, 13), "A very little will do to make out an assent by the creditors to the agreement."

This case is different from many of the cases mentioned in the course of the argument, where there had been a change in a firm of which a person trading with it had notice, and went on dealing with the new firm, and afterwards sought to make the old firm liable, and a question arose whether by his conduct he had not discharged the old firm, and adopted the liability of the new. Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets, and became subject to all the liabilities of the preceding firm, they "thenceforth treated the partners in that firm as their debtors, in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due."

If *Flower, Salting & Co.* had, under these circumstances, endeavoured to enforce the payment of their debt from the partners in the old firm of *W. Rutledge & Co.*, there would have been ample evidence to satisfy a jury that they had discharged the old firm, and had accepted the new one as their debtor.

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Their Lordships, therefore, are of opinion that the judgment of the Supreme Court was right, and that the Respondents were entitled to prove against the estate of the insolvent firm of *W. Rutledge & Co.*, for the amount still owing to them of the debt originally due from the former firm.

The appeal of the *Australasian Bank* relates to the proof under the insolvency of *W. Rutledge & Co.*, of the same debt of *Flower, Salting & Co.*, as in the case just considered, but raises an entirely different question.

At the time of the insolvency of *W. Rutledge & Co.*, the *Australasian Bank* were creditors, and proved against the estate for the sum of £30,249. 18s. 6d., the amount of their debt, after deducting £9,500. the estimated value of a security held by them over the separate estates of *William Rutledge* and *Horace Flower*.

At the same meeting, *Flower, Salting & Co.* tendered a proof for their debt of £53,587. 10s. 10d. This was opposed by the Bank on the ground that *Flower, Salting & Co.* were first bound to deduct from the amount for which they sought to prove the value of certain securities which they held on the estate of *William Rutledge*. The Commissioner of Insolvent estates decided, that *Flower & Co.* were bound to make this deduction, and rejected the proof.

From this decision *Flower, Salting & Co.* appealed to the Supreme Court of the Colony. The appeal was heard by Mr. Justice *Chapman*, one of the Judges of that Court, who overruled the decision of the Commissioner, and ordered that the proof tendered by *Flower, Salting & Co.* should be admitted for the full amount. The Appellants appealed from this judg-

ment to the full Court, when, after argument, an Order was made dismissing the appeal, without costs. From this order the present appeal is brought.

The question to be determined is, whether *Flower, Salting & Co.*, being creditors of an insolvent partnership, before they could be allowed to prove against the joint estate of the Insolvents, were bound to value a security which they held upon the separate estate of one of the partners. If the question had arisen in this country, there would have been no difficulty in answering it. It was asserted, indeed, in argument, that the rule, that the security to be deducted must be upon the same estate as that against which the proof is directed, was not laid down as a general rule by Lord *Eldon* in *Ex parte Peacock* (2 Gl. & Jam. 27). This, however, was not the opinion of Lord *Lyndhurst*, who in the case *In re Plummer* (1 Ph. 60), said: "In administration under Bankruptcy, the joint and separate estate are considered as distinct estates; and accordingly it has been held, that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security; on the ground, that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir *J. Leach*, and afterwards by Lord *Eldon*, and has since been followed in *Ex parte Bowden*" (1 Dea. & Ch. 135).

Whatever may have been the origin of the rule, it must now be considered to be the established law in this country.

It was said by Mr. *Hobhouse*, for the Appellants, that the rule was laid down without any consideration of its justice or expediency, and that it was most unjust that a creditor should secure himself *aliunde*,

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and yet come in *pari passu* with the other creditors. That the Colony of *Victoria*, in introducing the new Code of Insolvent Law, which is applicable to the present question, had been careful to prevent such injustice in the distribution of an Insolvent's estate. And he contended, that this was effectually done by the provisions of the Colonial Act, 5th *Vict.* No. 17, and especially by the 39th section. That section enacts, "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition, and when he is not the petitioning creditor in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction."

The whole stress of the argument arising out of this section is laid upon the words "any part of the insolvent estate." Mr. *Hobhouse* went carefully through the different sections of the Act in order to show that, throughout, one estate only is mentioned; and he contended that in every part of the Act an intention is manifested that there should be only one sequestration, extending over every part of an Insolvent's estate, applying to all the debts both of

joint and separate creditors, and one single indivisible administration of the whole. Of course, if he could prove that the Act intended to annihilate the distinction between joint and separate debts and joint and separate estates, in the distribution of an Insolvent's estate, he would establish his point. But it seems to be assuming the whole question thus to argue from the use of the word "estate" (in the singular) in the different sections of the Act. Even if the Act contemplated that both joint and separate estates would have to be administered, the language is quite capable of application to each estate respectively under administration. Too much reliance was placed upon the notion that the Colonial Legislature were impressed with a sense of the injustice of the rule prevailing in *England*, and were determined to guard against it in their new Code of Insolvent Law. Indeed, it may be doubted whether a new law on the subject of insolvency was introduced by the Act of 5th *Vict.* No. 17, for mention is made in it of two former Acts for the relief of debtors in execution for debts which they are unable to pay, one of them as early as the 2nd *Will.* 4.

But if this were the establishment of a new Code of Insolvent Law, and it was the object of the Colonial Legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in the single section of the Act. It is just as reasonable to suppose that, knowing the rule established in this country, which is founded not upon any statute, but upon general principles applicable to many other cases, they did not intend to disturb it. The alleged

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injustice of the rule has been endeavoured to be shown by viewing it on one side only. While the joint creditors are alone regarded, it may be successfully argued to be a hardship upon them that a creditor secured on a separate estate should resort to the joint estate, and so reduce their dividend; but, on the other hand, it may be contended, on the part of the separate creditors, that it would be a great injustice to them to compel the joint creditor, with a separate security, to have recourse, first to the separate estate, which he might exhaust, and thus leave the separate creditors without a fund for the payment of their debts. These conflicting views seem to put the argument of hardship aside, so as to allow the operation of the well-established principle, that, upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and that the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it. There seems to be no reason, therefore, why the words in the 39th section of the 5th *Vict.* No. 17, "any security or lien on any part of the insolvent estate," should not receive the construction of which they are capable, and be applied in each instance to the particular estate which is at the time the subject of administration.

There is one other point which does not bear upon the main question, but which, as it has been introduced as a ground of complaint on the part of the *Australasian* Bank, ought not to pass unnoticed. The Appellants state in their case, "that acting upon what they believe to be the law and justice of the case, they reduced the proof which they tendered by almost a fourth. The Respondents, holding secu-

rities of a much larger value, have claimed and established their right to prove for the whole debt without deduction."

If the secured debts of the parties were both due from the insolvent estate, there would of course be no reason for making any distinction between them. But a reference to their respective securities will show that this is not the case. The mortgage from *Rutledge* and *Flower* to the Bank of *Australasia* recites, that *Rutledge* and *Flower* are indebted to the Bank in the sum of £10,000, and the proviso is for the payment of the mortgage-money by *Rutledge* and *Flower*; therefore, the debt was not one which could have been proved against the insolvent firm of *Rutledge & Co.*, being due from two of the partners only. But the mortgage from *William Rutledge* to *Flower, Salting & Co.*, which is dated on the 30th of *June*, 1859, the day before the new partnership of *W. Rutledge & Co.* came into complete operation, contains a recital that there is due from the said firm to *Flower, Salting & Co.* of the sum of £60,000 and upwards, and the proviso is for payment by *W. Rutledge* or the firm of *William Rutledge & Co.* of the principal and interest of £60,000 "due and owing from the said firm of *William Rutledge & Co.*" So that this debt was a liability of the insolvent partnership, and not of some of the partners only.

Their Lordships will in both these cases humbly recommend to Her Majesty that the judgments be affirmed and the appeals dismissed with costs.

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SALTING & Co.



# CASES

HEARD AND DETERMINED  
BY THE  
JUDICIAL COMMITTEE  
AND THE  
LORDS OF THE PRIVY COUNCIL.

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THOMAS WALKER     -     -     -     *Appellant,*

AND

AUBER GEORGE JONES     -     -     *Respondent.\**

*On appeal from the Supreme Court (Equity side)  
of New South Wales.*

IN the autumn of 1861 the Respondent, *Auber George Jones*, in pursuance of a partnership arrangement entered into between him and one *Ralph Meyer*

18th & 19th  
Dec. 1865.

The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself,

\* Present :—Lord Chelmsford, the Lord Justice Knight Bruce, the Lord Justice Turner, Sir James W. Colvile, and Sir Edward Vaughan Williams.

although the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such re-conveyance upon such payment being made.

Where, therefore, a mortgagee having, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities :—

*Held*, that he was not entitled so to sever the debt from the security, and an injunction, granted against his proceeding at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor, to redeem and to settle the equities of the parties, sustained.



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*Robey*, made and delivered to *Robey* four promissory notes in favour of *Robey*, for securing the sum of £8,148 13s. 4d., each note bearing date the 17th of *October*, 1861, being for one-fourth of such amount, and payable respectively at six, twelve, eighteen, and twenty-four months after date, with interest at ten per cent. per annum. Some alterations were afterwards agreed to be made in the amounts and times of payment of the notes, and ultimately five notes were given of the same date, for sums amounting in the whole to £9,505 6s. 5d., payable at six, twelve, eighteen, twenty-four, and thirty months respectively after date, with such interest as before stated.

The due payment of these notes was further secured by a mortgage executed by the Respondent *Jones*, in favour of *Robey*, of the undivided share of the Respondent in certain stations known as *Gobbagumblin* and *Teoyal*, with the live stock thereon.

The mortgage was dated the 14th of *April*, 1862, and contained a power of sale, exercisable in the event of default being made in payment of any one or more of the promissory notes.

In the month of *April*, 1862, *Robey* discounted one of the promissory notes for £2,444 12s. 4d., and endorsed the same with the three other promissory notes which had been made by the Respondent by way of renewal of his original notes, to the Appellant, by whom they were discounted.

*Robey* received from the Appellant the full value of the notes discounted, and he at the same time executed in favour of the Appellant a transfer of the mortgage of the 14th of *April*, 1862.

The transfer was endorsed on the mortgage deed,

and was as follows :—" By this instrument, made the 24th day of *April*, 1862, upon a mortgage of live stock from *Auber George Jones* to me, the undersigned, *Ralph Meyer Robey*, dated the 14th of *April*; and registered the 23rd of *April*, I, the said mortgagee, do, in consideration of value received by the discounting of four promissory notes, now current, and secured by the within mortgage, transfer the said mortgage to *Thomas Walker*, of *Sydney*, Esquire, at present absent from the Colony, to the intent that, in pursuance of the legislative provision in this behalf, the said *Thomas Walker* may, as such endorsee, have the same right, title, and interest as I have or should otherwise have therein. And in case it shall at any time be found necessary or convenient to act in my name in the premises, as the original or apparent mortgagee, I hereby constitute the said *Thomas Walker*, his executors, administrators, and assigns, my lawful attorney or attorneys, with full power of substitution for all purposes in relation to the said mortgage, or the enforcement of the terms and conditions thereof."

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The payment of the amount advanced by the Appellant on the above promissory notes, and of any further advances which might be made by him to *Robey*, was further secured by a mortgage of other property of *Robey*, known as a portion of the *Camperdown* estate.

On the 24th of *September*, 1862, the Appellant, in consideration of £4,000 paid to him by *Robey*, executed a re-conveyance to *Robey* of the undivided share in the station and premises comprised in the mortgage of 14th of *April*, 1862.

The re-conveyance was endorsed on the mortgage

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deed, and was in the following terms: — “ Know all men by these presents, that I, the within named *Thomas Walker*, in consideration of £4,000, by the within named *Ralph Meyer Robey* to be paid, the receipt of which I do hereby acknowledge, do, by these presents, assign to the said *Ralph Meyer Robey* all my interest in the within indenture of mortgage, and all and singular the stations and live stock, and all other the premises comprised therein, to hold to the said *Ralph Meyer Robey*, his executors and administrators, discharged from the payment of the several promissory notes held by me, and the moneys thereby secured, and for his and their own absolute property, subject to any equity of redemption subsisting therein (if any), on the part of the said *Auber George Jones*, but without prejudice to any other remedy or security for the said *Thomas Walker* for any of the said promissory notes remaining in his hands unretired and unsatisfied.”

The Appellant retained and continued to hold the promissory notes discounted by him as aforesaid.

The promissory note for £2,444 12s. 4d., which matured on the 20th of *October*, 1863, was the first of the notes that fell due, and as it was not paid at maturity, the Appellant brought an action in the Supreme Court of *New South Wales* against the Respondent, to recover the amount thereof.

On the 27th of *May*, 1864, the Respondent filed a Bill in the Supreme Court, in its equitable jurisdiction, against the Appellant and *Robey*, then out of the jurisdiction, as the Defendants thereto, and thereby alleged, that he had in the month of *November*, 1861, entered into a partnership arrangement with *Robey* for carrying on the business of wool

growing and breeding sheep and cattle on the stations of *Gobbagumblin* and *Tooyal*, and that he had given the four promissory notes to *Robey* on the occasion of his entering into such partnership, some of which were renewed, and that subsequently, and in the month *September*, 1862, the Respondent, in consideration of £1,000, to be paid to him by *Robey*, and in further consideration of *Robey* delivering up to him the promissory notes, cancelled, sold, and relinquished all his interest in the station and stock to *Robey*, and determined the partnership; but that *Robey* had not delivered up the promissory notes, and that he still retained the first of the promissory notes which fell due on the 20th of *April*, 1862; and after stating the above facts, the Respondent alleged, to the effect, that the Appellant had notice of the Respondent's position as mortgagor when the Appellant discounted the promissory notes for *Robey*, and also that the Appellant, at the time he executed the conveyance to *Robey*, had notice of the rights and interests of the Respondent, under the alleged agreement for dissolution of the partnership between him and *Robey*, and of the alleged dissolution having taken place; and the Bill prayed that the promissory notes in the hands of the Appellant might be delivered up to be cancelled, and for an injunction to restrain the action, or any further proceedings on the promissory notes, or, if necessary, for accounts, and for further relief.

The Respondent applied *ex parte* for an injunction to restrain further proceedings in the action, and he supported his application by the affidavits of himself and his solicitor, *Hillyer*; and the Primary Judge in Equity of the Supreme Court, Mr. Justice *Milford*, awarded an injunction restraining the Appellant from

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further proceeding in the action, and from prosecuting any further action on the note, or any of the notes, in the Bill mentioned, until further order.

The Appellant thereupon moved the full Court to dissolve the injunction, and evidence by affidavit and *vivâ voce* was produced both by the Appellant and Respondent, in support of and against the application. It did not appear by the evidence that the Appellant had notice of the partnership arrangement between the Respondent and *Robey*, or of the agreement for the dissolution thereof, when he discounted the promissory notes and executed the reconveyance to *Robey*, and he insisted that he was in fact a *bonâ fide* holder for value without notice of the promissory notes discounted by him.

The motion came on to be heard before the Primary Judge on the 21st of *June*, 1864, and was refused with costs.

The Appellant appealed from the decision of the Primary Judge to the full Court, and the appeal came on to be heard before the full Court, consisting of the Chief Justice, Sir *Alfred Stephen*, Mr. Justice *Milford*, and Mr. Justice *Wise*, on the 6th of *August*, 1864, and was also dismissed with costs.

The Judges differed in their opinions. The Chief Justice was of opinion that the order of the Primary Judge should be reversed and discharged; but the majority of the Court were of opinion that the order should be confirmed, and held in effect that the Appellant, by conveying the share of the station and premises comprised in the mortgage of the 14th of *April*, 1862, to *Robey*, had prejudiced the right of the Appellant to redeem the mortgaged premises on payment of the amount of the promissory notes, and,

therefore, that it was inequitable for the Appellant to sue the Respondent on the promissory note. The Chief Justice was of opinion that the Appellant, as holder for value of the promissory notes, was entitled to deal with his security, and to convey the mortgaged premises to *Robey*, in consideration of the payment made by him to the Appellant; that the promissory notes were not necessarily to be held with the mortgaged security; and that the Appellant, having acted in good faith, was entitled to convey the property as he did, subject to the equity of redemption of the Respondent, reserving his remedies on the promissory notes.

From this judgment of the full Court the Appellant brought the present appeal.

The Attorney-General (Sir *R. Palmer*), and Mr. *Druce*, for the Appellant.

The judgment of, the majority of the Judges in the Court below is, we apprehend, erroneous, and cannot be supported. There is nothing in the circumstances of the case to preclude the Appellant from recovering at law on the note in question, or any of the other notes in his hands. It is admitted that *Robey* was the Appellant's debtor on the discount transaction. The Appellant was entitled, on receiving a payment from *Robey*, to deal with mortgage securities in such manner as *Robey* and he might agree, subject, of course, to the Respondent's equity of redemption, without any prejudice to the Appellant's legal remedies on the promissory notes remaining unpaid. In *Ex parte Loaring* (a), a vendor was

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(a) 2 Rose's Bankruptcy Cases, 79.

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held not to have waived his lien on the estate sold by taking the promissory note of the vendee, and receiving its amount by discount: *Grant v. Mills* (a); and in *Ex parte Waring* (b) it was ruled that a holder of a bill of exchange had no lien on property deposited by the drawer with the acceptor to cover the liability of the latter in respect of his acceptance, yet that on the bankruptcy of the drawer and acceptor the arrangement of the property between the two estates may indirectly render such an equity available. Here the debt and the mortgage security are in the very nature of the transaction divisible, and were intended by both the original parties to have been so, with all the consequences attaching to such a state of things from the outset. The effect of the re-conveyance of the mortgaged premises to *Robey* was not in any manner to injure or prejudice the right of the Respondent as mortgagor, but merely to leave matters in the same situation in which they would have been if the promissory notes had been discounted by the Appellant, without any conveyance to him of the mortgaged premises. In that case *Robey* would have been entitled, according to the original contract on the mortgage, to hold the premises as his security for the payment of the notes, although in the hands of his endorsee; and the Respondent, on payment or satisfaction of the notes, would have been entitled to a re-conveyance from *Robey*. The mortgaged premises, when re-conveyed by the Appellant, were subject to redemption by the Respondent in the hands of *Robey*; and the Appellant cannot be held liable for the defaults of *Robey*. The Appellant, when he

(a) 2 Ves. &amp; Bea. 306.

(b) 2 Rose's Bankruptcy Cases, 182.

executed the re-conveyance, had, in fact, no notice of the matters alleged in the bill; but the Respondent, having made default in payment of the promissory notes, is not entitled to any relief in equity against the Appellant. The Respondent was in no respect injured by the transfer of the mortgage to the Appellant, and all ground of complaint against either the Appellant or *Robey* in respect of that act fails.

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Sir *Hugh Cairns*, Q. C., and Mr. *A. T. Watson*,  
for the Respondent.

The injunction in this case was rightly granted, the Appellant by his conduct, and by the manner in which he has dealt with the mortgage security, has deprived himself of all right to sue on the promissory notes. A Court of equity will not allow a mortgagee to proceed on his collateral securities, when he has put it out of his power to re-convey the mortgaged property: *Lockhart v. Hardy* (a). In that case, after foreclosure, the mortgagee fairly sold the estate for less than was due to him, and it was held that he could not afterwards recover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid. That is good law, and has been followed by *Palmer v. Hendrie* (b). In *Perry v. Barker* (c); *Thornton v. Court* (d), after foreclosure and sale of a mortgaged estate, an injunction was granted to restrain the mortgagee from recovering the difference at law: *Schoole v. Salle* (e); *Bentinck v. Willink* (f). The principle of all these cases is, that a mortgagee

(a) 9 Beav. 349.

(c) 8 Ves. 527a.

(e) 1 Sch. & Lef. 176.

(b) 27 Beav. 349; S. C. 28 Beav. 341.

(d) 3 D. M. & G. 293.

(f) 2 Hare, 1.



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described, *Ralph Meyer Robey* conveyed to the Appellant, by way of security for the advances, a parcel of land belonging to him, part of an estate called the *Camperdown Estate*. By another indenture dated the 14th of *April*, 1862, and made between the Respondent of the one part, and *Ralph Meyer Robey* of the other part, the Respondent assigned to *Ralph Meyer Robey*, for his absolute benefit, his the Respondent's one-third share of said stations and stock, subject to a proviso, that if the Respondent should pay and retire the said promissory notes as and when the said should become due, the said indenture should become null and void, but that if the Respondent should make default in payment of the said promissory notes, or any of them, on the days when the same should respectively become due, then, and at any time after such default, it should be lawful for *Ralph Meyer Robey* to take possession of the premises, and hold the same as his absolute property, and whether such possession had been taken or not, to sell and dispose of the same as he should think fit; and that the moneys to arise from any such sale, after payment of the expenses, should be applied in payment of the promissory notes, or such of them as should remain unpaid, whether the same should be due or not, and the surplus, if any, should be paid to the Respondent.

On the 20th of *April*, 1862, the first of the above-mentioned notes became due. It does not appear whether it was paid, or what was done with respect to it, nor is it material, the transactions with which we have to deal in this case having reference to the four other notes which at this time remained current. On the 24th of *April*, 1862, *Ralph Meyer Robey*, by an endorsement on the mortgage of the 14th of *April*,

1862, in consideration of value received by the discounting of the four promissory notes then current, and secured by the said mortgage, transferred the said mortgage to the Appellant, to the intent that in pursuance of the legislative provision in that behalf, the Appellant might, as such endorsee, have the same right, title, or interest as he the said *Ralph Meyer Robey* had, or would otherwise have had therein; and by this endorsement the said *Ralph Meyer Robey*, in case it should at any time be found necessary or convenient to act in his name in the premises as the original or apparent mortgagee, constituted the Appellant his attorney for all purposes in relation to the said mortgage, or the enforcement of the terms and conditions thereof.

On the 12th of *September*, 1862, it was agreed between the Respondent and *Ralph Meyer Robey*, that the partnership between them should be dissolved, and that the Respondent should sell to *Ralph Meyer Robey* all his interest in the said stations and stock, in consideration of the sum of £1,000 to be paid to him by *Ralph Meyer Robey*, and of *Ralph Meyer Robey* delivering up all the said promissory notes cancelled. The partnership was accordingly dissolved, and *Ralph Meyer Robey* gave to the Respondent two promissory notes of £500 each, but he did not deliver up the promissory notes which had been drawn by the Respondent, the Respondent being satisfied with his assurance that they were cancelled.

On the 24th of *September*, 1862, the Appellant, by his attorney, executed a deed-poll (which was also endorsed on the mortgage of the 14th of *April*, 1862), whereby, in consideration of £4,000 to be paid by *Ralph Meyer Robey*, he assigned to *Ralph Meyer*

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*Robey* all his interest in the mortgage, and all and singular the stations and stock, and all other the premises comprised therein, to hold to *Ralph Meyer Robey* discharged from the payment of the several promissory notes held by him the Appellant, and the moneys thereby secured, and for his own absolute property, subject to any equity of redemption subsisting therein, if any, on the part of the Respondent, but without prejudice to any other remedy or security of the Appellant on any of the said promissory notes remaining in his hands unretired and unsatisfied.

Some time after the promissory note which was due on the 20th of *October*, 1863, had become due, the Appellant commenced an action in the said Court, in its common law jurisdiction, against the Respondent upon that note, and thereupon, and on the 27th of *May*, 1864, the Respondent filed the Bill in the cause out of which this appeal has arisen against the Appellant and *Ralph Meyer Robey*, who was out of the jurisdiction of the Court, stating the facts above mentioned, and further to the effect that the Respondent had no notice of the dealings between the Appellant and *Ralph Meyer Robey*, and that the Appellant had notice of the dealings between *Ralph Meyer Robey* and him, the Respondent, and that the Appellant could by sale or realization of the stations and stock assigned to him, have obtained a sum of money sufficient to have paid off all the said notes, and that the value of the property re-assigned to *Ralph Meyer Robey* was sufficient to pay a larger sum than the total sum for which the said notes were given, and praying that the promissory notes in the hands of the Appellant might be delivered up to be cancelled, and that the Appellant might be restrained from proceed-

ing in the action commenced by him, and from prosecuting any further action on any of the said notes, and that if necessary an account might be taken of what was due on the notes, and that on taking such account the Respondent might be credited with the £4,000, and with the difference between the actual value of the mortgaged property re-assigned by the Appellant to *Ralph Meyer Robey* and the said sum of £4,000; and that, if upon taking such account any sum should be found due from the Respondent, he might be reimbursed out of the securities given by *Ralph Meyer Robey* to the Appellant, by the deed of the 11th of *February*, 1862. Upon the filing of this Bill an *ex parte* injunction was granted by the Primary Judge of the Court to restrain the Appellant from proceeding in the said action, and from prosecuting any further action on any of the said notes. A motion was afterwards made, on the part of the Appellant, before the Primary Judge, to dissolve the injunction, but on the 21st of *June*, 1863, the Primary Judge refused this motion with costs. Upon these motions evidence was adduced on the part of the Respondent for the purpose of fixing the Appellant with notice of his the Respondent's dealings with *Ralph Meyer Robey*, but the evidence was not sufficient to fix the Appellant with such notice.

The Appellant appealed from the order of the Primary Judge dismissing the motion to dissolve the injunction to the full Court of appeal, but that Court, by an order bearing date the 6th of *August*, 1864, dismissed the appeal with costs. It is from this last-mentioned order the appeal which we have now to dispose of has been brought.

In disposing of this appeal, we think it right, in the

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first place, to observe that questions possibly of some nicety and difficulty as to the rights and obligations of mortgagees, in their dealings with the mortgaged property, appear to be involved in this cause, and that the stage of the cause in which this appeal has been brought renders it difficult for us now to deal with those questions. They are questions more proper to be determined at the hearing of the cause, and it is not necessary, nor, indeed, would it be right, for us now to give any final opinion upon them; but yet the consideration of them is necessarily, to some extent at least, involved in the question which alone we have to consider, whether the order under appeal ought or ought not to have been made. The real point before us upon this appeal is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions are such that it was proper that the injunction should be granted until the time for deciding them should arrive. The material points, and those with which only we think it necessary to deal, appear to us to be these:—What were the relations subsisting between the Appellant and the Respondent? what were the rights and obligations flowing from those relations? and whether the course of conduct pursued by the Appellant has been in conformity with, or in opposition to, those rights and obligations, considering, as we repeat, these several questions with reference only to their bearing upon the order under appeal, and not for the purpose of finally deciding them. As to the first of these questions, we think that no doubt can reasonably be entertained. We take it to be clear that the endorsement of the 24th of *April*, on the mortgage of the 14th *April*, 1862,

placed the Appellant in the position of a mortgagee of the property comprised in that mortgage, and that thenceforth the relation of mortgagee and mortgagor subsisted between the Appellant and the Respondent. The assignee of a mortgage cannot, in our opinion, stand in any different character, or hold any different position, from that of the mortgagee himself, although, as in this case, the mortgagor may not have been a party to the assignment; then, secondly, what were the rights and obligations flowing from this relation between the Appellant and the Respondent, and we think that this point is open to no greater difficulty. It is also clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt.

Has, then, the course of conduct pursued by the Appellant been in conformity with, or in opposition to, these rights and obligations? Now, what the Appellant has done is this: he has, by the endorsement of the 24th of *September*, 1862, transferred the property comprised in the mortgage to *Ralph Meyer Robey*, retaining to himself the debt secured by the mortgage. He has not, as he might have done, sold the property comprised in the security, but he has, in effect, sold the security itself, which he certainly was not authorized by the mortgage deed to do. Now, it is not necessary for us to say that in no case can the mortgage debt be severed from the security for that debt; nor is it even necessary for us to say that, in

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this particular case, the debt and the security could not be so severed. It is sufficient, if there be a question upon the point proper to be determined upon the hearing of the cause, and on looking to the cases of *Palmer v. Hendrie* (a), and *Thornton v. Court* (b), we have no difficulty in arriving at this latter conclusion.

It was said for the Appellant that *Palmer v. Hendrie* was the case of principal and surety, but what was said upon the point under consideration did not proceed upon that ground, and the case of *Thornton v. Court* in no way involved any question of suretyship. These cases, therefore, from which we see no reason for dissenting, seem to us to be of themselves sufficient to show, that upon this point alone, there was a question of no little importance to be decided at the hearing of the cause; and, therefore, to have furnished sufficient ground for the granting of this injunction. But this case does not rest here, for upon the transfer of the security to *Ralph Meyer Robey*, by the endorsement of the 24th of *September*, 1862, the Appellant received from him the sum of £4,000, which, after paying the bill due on the 20th of *January*, 1863, would go far to meet the bill which became due on the 20th of *October*, 1863, and on which the Appellant has brought his action; and it cannot, we think, be otherwise than a very serious question, to be decided at the hearing of the cause, how this sum of £4,000 ought to be dealt with in account between the Appellant and the Respondent; there was here, therefore, further ground for granting this injunction. It was urged for the Appellant that the position of the Respondent was in no way altered; that had *Ralph*

(a) 27 Beav. 349.

(b) 2 D. M. & G. 293.

*Meyer Robey* retained the security when he discounted the bills, the Appellant must have paid the bills, and then sued *Ralph Meyer Robey* for the re-conveyance of the mortgaged property, and that he could do so now, the transfer to *Ralph Meyer Robey* having been made subject to the Respondent's equity of redemption, if any; and, further, it was urged for the Appellant, that the Respondent had nothing to do with the transaction between the Appellant and *Ralph Meyer Robey*, but we are by no means satisfied that it may not well be held to be a sufficient answer to these arguments that they lay out of consideration the Appellant's position and duties as mortgagee, and proceed more upon a view of the case as it might have stood, than as it actually stands. It was further argued, on the part of the Appellant, that in any event, the order under appeal ought not to have been made, except upon the terms of money being paid into Court, but the receipt by the Appellant of the £4,000 goes far to answer this objection, and we see no sufficient reason for interfering with the discretion exercised by the Court in this respect. Upon the whole, therefore, we are of opinion that this appeal cannot be supported, and we shall humbly recommend her Majesty to order that it be dismissed, and dismissed with costs.

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## ON APPEAL FROM NEW BRUNSWICK.

HENRY WICKHAM WICKHAM and  
 others, on behalf of themselves and  
 the DEBENTURE-HOLDERS in the } *Appellants,*  
 NEW BRUNSWICK and CANADA  
 RAILWAY and LAND COMPANY -

AND

THE NEW BRUNSWICK and CANADA } *Respondents.\**  
 RAILWAY COMPANY and others -

16th, 18th, &  
 22nd Dec.  
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The *N. B. & C.*  
*Railway*  
*Company*, in-  
 corporated by  
 a local Act,  
 being also a  
 land Com-  
 pany, trans-  
 ferred by  
 agreement,  
 together with

the undertaking, all its property, lands, rights, and appurtenances to the *N. B. & C. Railway Company*, also incorporated—such agreement being confirmed by a private Act of the Imperial Parliament.

The *N. B. & C. Railway Company* having borrowed money, issued Debentures to secure the same; these were termed Mortgage Debentures, the principal and interest thereon being secured on the undertaking, and all moneys to arise from the sale of the lands of the Company, all future calls on shareholders, and all tolls and sums of money which should become due, with the plant and rolling-stock, and with power of entry and possession of the same, in failure by the Company of payment of principal and interest as therein specified, with a proviso that nothing therein contained should be held to limit the power of sale or appropriation by the Company of any of the lands of the Company, nor constitute a charge on the same. These bonds were not registered:—

Held, by the Judicial Committee, first, that such Debentures did not constitute a charge in the nature of an equitable mortgage on the lands

IN this case, the appeal was brought from an order of the Supreme Court of *New Brunswick*, on its equity side, which affirmed a previous order of a single Judge of that Court, refusing a motion on behalf of the Appellants and other Debenture-holders

\* Present — Lord Chelmsford, The Lord Justice Knight Bruce, The Lord Justice Turner, Sir James W. Colvile, and Sir Edward Vaughan Williams.

in the *New Brunswick and Canada Railway Company*, Plaintiffs in the original suit, for an injunction to restrain the Respondents, the Railway Company and others, execution creditors of the Company, with the Sheriffs of the counties of *York* and *Charlotte*, the President and Company of the *St. Stephen's Bank*, the Defendants, from selling, and, if allowed to sell, from paying over the proceeds of the sale of the lands of the *New Brunswick and Canada Railway* to certain Judgment creditors of the Company, upon whose judgments executions had issued, and for an order to compel the Sheriffs, on the sale of such lands, if sold, to pay over the proceeds to the Receiver appointed by a previous order of the Supreme Court in a cause in which the Appellants were Plaintiffs, and the *New Brunswick and Canada Railway Company* Defendants.

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The facts were these:—

The *St. Andrew and Quebec Railway Company* was incorporated in 1836, by an Act of the local Legislature of *New Brunswick*, for the purpose of making a Railway from *St. Andrew's*, in that Province, to *Quebec*, in *Canada*. The shares in this Company were divided into two classes; and those of them which were distinguished as Class A shareholders were, by an Act of the Imperial Parliament, 13th & 14th Vict. c. 106, constituted a separate corporation, with special property and rights.

of the Company, so as to give the holders of such Debentures a right to restrain the sale of the lands by Judgment creditors of the Company, or any title to the proceeds of the lands when sold.

Secondly, that as Judgment creditors under an execution take the precise interest, and no more, which the debtor possesses in the property seized, the sale being a sale by the law, and not by the Company, such Judgment creditors took the lands, subject to any incumbrances, legal or equitable, that they were subject to in the hands of the Company.

According to the law of *New Brunswick*, freehold lands of a debtor, if the personal estate is exhausted, may be sold under a *fi. fa.*

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The *New Brunswick and Canada Railway and Land Company* (Limited), was incorporated under the provisions of the Joint Stock Companies Act, 1856, with a nominal capital of £800,000, divided into 40,000 shares of £20 each. The memorandum of association of the Company stated it to be incorporated for the object of accepting a transfer of the *St. Andrew's* and *Quebec* Railway Company, and of purchasing all the lands, property, rights, and expectances of that Company, and the lands, rights, and expectances of the Class A shareholders for the purpose of carrying the undertaking, or any part thereof, of that Company into execution, and for other purposes relating to that undertaking.

By articles of agreement, dated the 26th of *September*, 1856, confirmed by a private Act of the Imperial Parliament, 20 & 21 *Vict.* c. 154, the undertaking of the *St. Andrew's* and *Quebec* Railway Company, with all its property, lands, rights, and appurtenances of the Class A shareholders of the Company, with certain exceptions and reservations, were transferred to the *New Brunswick and Canada Railway Company* on the 24th of *October*, 1856, and the Company completed a portion of their Railway.

The Appellants were holders of Debentures of the *New Brunswick and Canada Railway Company* to the aggregate amount of £105,960. The Respondents (except the Company and the Sheriffs) were Judgment creditors of the Company, upon judgments signed and entered after the date of the Appellant's Debentures.

Subsequent to the date of the incorporation of these two Companies, and prior to the signing of the judgments of the Respondents, the *New Brunswick* and *Canada* Railway Company issued Debentures, to

secure money borrowed by them to carry on their operations, the nominal issue being £200,000.

One of these Debentures (all of which were in the same form), granted by the Company to the Appellant, *Wickham*, was as follows :—

“£1,000 sterling.

“*New Brunswick and Canada Railway and Land Company (Limited).*

“Mortgage bond (of the first series limited to £200,000 sterling).

“No. 887. Register No. 13.

“Indenture of mortgage made between the *New Brunswick and Canada Railway and Land Company (Limited)*, constituted and regulated under ‘The Joint Stock Companies Act, 1856,’ and ‘The *New Brunswick and Canada Railway and Land Company’s Act, 1857,*’ of the one part, and *Henry Wickham Wickham*, M.P., of *Chapel Street, Hyde Park*, of the other part: Whereas the said *Henry Wickham Wickham* has advanced to the said Company the sum of £1,000 sterling, on condition that the said Company will repay the same to him on the 1st day of *January, 1867*, with interest thereon in the meantime at the rate of £6 sterling per cent. per annum, by equal half-yearly payments, on the 1st day of *July* and the 1st day of *January* in every year. Now it is hereby witnessed that, for securing the said advance and interest, the said Company hereby grant to the said *Henry Wickham Wickham*, his executors, administrators, and assigns, the undertaking of the said *New Brunswick and Canada Railway and Land Company*, and all moneys to arise from the sale of the lands of the said Company for the time being, and all future calls on shareholders of the

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said Company, and all the tolls and sums of money which shall become due to the said Company, including the provisional guarantee, and also all engines, tenders, passengers' and other cars, and every description of rolling-stock, rails, sleepers, goods and chattels of the said Company, whatsoever or wheresoever being, and all the estate, right, title, and interest of the said Company in the same. And it is hereby declared that, if the said Company fails in paying the said principal and interest moneys hereby secured respectively, or one or other of them, on any of the days hereinbefore specified for payment of the sums respectively, the said *Henry Wickham Wickham*, or any person for the time being entitled to such moneys, may, at any time thereafter, upon giving to the said Company three months' notice, enter upon the receipt of the said proceeds of sales, tolls, calls, and sums of money which may thereafter become due to the said Company in any manner from or in respect of the said undertaking; and upon the absolute possession of the said engines, tenders, cars, rolling-stock, rails, sleepers, goods and chattels of the said Company before mentioned, and the said road, and the entire charge, control, and working thereof, and reimburse himself thereout, all sums due on this security, and all expenses incurred by the said *Henry Wickham Wickham*, in respect of such receipts and the working of said road, and all other expenses incidental to the power hereby granted, rendering the surplus, if any, to the said Company or their assigns: Provided that the mortgage under this indenture, and the several mortgages under any further indenture already or to be hereafter executed by the said Company within the first issue of £200,000, shall be entitled *pari passu*, one with another, to their respec-

tive proportions of the undertaking, proceeds of sales, tolls, calls, and sums of money, according to the respective sums in such mortgages mentioned, to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference, one above another, by reason of the priority of the date of any such mortgage. But the bonds of the said first issue of £200,000 shall have a prior claim to any other bonds whatever which may be issued, in addition to the said first series of £200,000: Provided also, that nothing herein contained shall be held to limit the power of sale or appropriation by the said Company of any of the lands of the said Company, nor constitute a charge upon the same."

The other Appellants, also Debenture-holders, claimed to be entitled under similar instruments.

None of the Debenture bonds granted by the Company were registered, in accordance with the Statute for the Registry of Deeds and other instruments (Revised Statutes of *New Brunswick*, tit. xxx. c. 112), which (sec. 4) provides, that "all conveyances, memorials of judgments, or other instruments by which any lands may be affected, in law or equity, except any lease for a term not exceeding three years, shall be registered at full length in the registry office of the county where the lands lie, and, if not so registered, shall be fraudulent and void against subsequent purchasers for valuable consideration, whose conveyances are previously registered;" and every judgment so registered, or an execution thereon delivered to the Sheriff to be executed, shall bind the lands of the persons against whom the judgment was incurred or the execution issued.

The Respondents, the President, Directors and

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Company of the *St. Stephen's Bank* were, with others, execution creditors of the Company for sums amounting in the aggregate to £12,547 15s. 10d. The Respondents' judgments were registered in the month of *August*, 1863, in the counties of *York* and *Charlotte*, in *New Brunswick*; and writs of *fiery facias* were issued on them respectively, and placed in the hands of the Sheriffs of those counties.

By the 6th section of the same Statute (tit. xxx. c. 113), freehold lands of a debtor are saleable under a writ of *fiery facias*, when personal estate, if any can be found, is exhausted. In the present case, no personal estate of the debtors could be found in either county, the whole having been seized on behalf of the Debenture-holders, and the Sheriffs accordingly proceeded to seize and advertise for sale certain lands of the Company, situate in their respective counties. The lands so seized did not constitute any part of the permanent way, and were not, in fact, any part of the railroad or works connected therewith; but, as it appeared, consisted of lands which were granted to the Company by the Government of the Province, by way of subvention, and which the Company might either have sold or divided among its shareholders.

On the 9th of *May*, 1864, the Bill was filed by the Appellant, *Wickham*, who claimed to be a debenture-holder of the Company to the amount of £92,000 sterling, of which £10,000 was alleged to have become payable on the 1st of *March* previously; together with *Evan Thomas* and *John Field*, two other Debenture-holders to a large amount, against the Respondents, the Railway Company; the President and Directors of *St. Stephen's Bank*, and also four other execution creditors of the Company. The Sheriffs of

the counties of *Charlotte* and *York* were also made Defendants to the Bill. The Bill, after stating to the effect hereinbefore mentioned, alleged that the Sheriffs had levied upon and advertised all the lands of the Company for sale under the respective executions in the months of *June* and *September* then next, and that the Sheriff of the county of *York*, upon being applied to, to pay the proceeds of the land so sold under the executions, into the hands of the Receiver (appointed under an order of the Court made in *August*, 1863, in a cause wherein the Appellants were Plaintiffs, and the *New Brunswick* and *Canada* Railway and Land Company (Limited) were Defendants, to receive the proceeds of the sale of the lands of the Company), declined to pay the same unless under the order of the Court, or to stay the sale thereof; and that the Sheriff of *Charlotte* had given a nearly similar answer, alleging in addition, that in regard to the proceeds of the sale of the lands under the executions, he should be governed by circumstances, and either pay them to the Plaintiffs in the executions, or hold them subject to the order of the Court. The Bill also alleged, that the interest on the debentures was in arrear from the 1st of *January*, 1863, and that the Debenture-holders had no means of obtaining payment of the bonds and interest thereon, except through the lands so levied upon and advertised for sale, and the other property of the Company mortgaged to them; and the Bill prayed that the *New Brunswick* and *Canada* Railway and Land Company, the Sheriffs and Judgment creditors, might be restrained from selling the lands so levied upon and advertised until the Debentures were paid; or in the event of a sale being allowed, the Sheriffs might be restrained from paying

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over the proceeds of such sale to the Judgment creditors; and for an order compelling the Company, the Sheriffs, and the Judgment creditors to pay over the proceeds to the Receiver so appointed as aforesaid.

A motion was made on notice before Mr. Justice *Wilmot*, one of the Judges of the Supreme Court, for an injunction in terms of the prayer of the Bill, which he refused the application. From the order refusing the injunction, an appeal was brought to the full Court, and on the 22nd of October, 1864, the judgment of that Court was delivered by Chief Justice *Carter*, dismissing the appeal with costs. The grounds of the judgment were, first, that the Judgment creditors, whose judgments were duly registered, had no notice of the Debentures; and, secondly, that the Debentureholders claim that the bonds amounted to a mortgage of the proceeds of the lands, and that they were in the position of equitable mortgagees of the land itself, could not be sustained, as there was no analogy in the circumstances to an equitable mortgage. The learned Chief Justice then proceeded:—"At the time when the judgments were recovered, the land became legally charged and liable to be sold as personal estate to satisfy these judgments. It can only be sold for that purpose, under executions issued on these judgments, and when so sold the proceeds must be applied as the law authorizing the sale directs, and equity cannot, in our opinion, in this case stop such sale, and so prevent a party having a charge by Statute from making available such lien in the manner pointed out by the enactment, binding the land, for the simple reason that the party asking the intervention has no right, or title to, or charge on the land, and so no interest therein. Nor can equity declare the Judgment credi-

tors, or the Sheriff, after such a sale, trustees for the Debenture-holders, and decree either of them to hold the proceeds of such sale (not for the Judgment creditors for whose sole benefit the law gives the charge and authorizes the sale, but) for the benefit of parties setting out a claim directly antagonistic. To do so, would be to destroy the legal charge of the one party, and give to the other a charge which by their agreements they expressly stipulated they were not to have. Can it be said that in competition with the Judgment creditors who have perfected their title by registry, execution, levy, and sale, the Debenture-holders have an equal equity?—they have acquired no right, legal or equitable, to the land itself, though very possibly a right to proceed against their debtors *in personam* upon a sale by them. We would not, however, by any means be understood as saying that a Judgment creditor may take any property whatever without regard to equitable interests. If the title of an equitable mortgagee is complete, and so constitutes a lien or charge on the land, it may be fairly open to argument, that notwithstanding our Registry Acts, though the judgments operated as a charge, they must be taken as a charge subsequent to the lien or charge before created by a perfected equitable mortgage. In the view we have taken of this case, the question does not arise, and we express no opinion on it. But to allow parties to hold lands unencumbered on the records of the county in which they lie, and thus enable them to obtain credit on the strength of owning such unencumbered lands, and after judgments obtained and registered, to permit such judgments to be cut down by secret bonds of the extraordinary character now put forward, and which expressly

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reserve the lands free from charge, would, in our opinion, be not only at variance with the whole policy of our legislation on this subject, but with every principle of justice and equity."

The present appeal was brought from this order.

Sir *Hugh Cairns*, Q.C., and Mr. *Swanston*, for the Appellants :—

First, we submit that the debentures held by the Appellants constituted a mortgage on all the property of the Company. As the debentures give the holders an absolute mortgage over all the property of the Company, the Company could not give their Judgment creditors any greater interest in the property than they had themselves at the date of the judgments, at which time the Company had no interest in its property except subject to the debentures, and the Judgment creditors can only take what the Company had the power to charge. The true construction of the clause in the debentures which provides that nothing therein contained should be held to limit the power of sale or appropriation by the Company of any of the lands of the Company, is plain ; it was introduced for the sole purpose of enabling the Company, as a land company, to effect sales of lands whenever they judged it expedient so to do, without the concurrence of the Debenture-holders being required to perfect the title of the purchaser, the right of the Debenture-holders attaching to the proceeds of the sale in the place of the land sold. It cannot be doubted that the true effect of the debentures is to give the Debenture-holders an absolute mortgage over all the property of the Company, and this is not made less absolute by the condition that the Company might exchange land

for money whenever it chose. The debentures amount to an agreement that the Company should hold their lands in trust to sell them, when and as they should think expedient, and apply the proceeds of the sale in payment of the Debenture-holders; neither the Company nor any Act of Parliament regulating the right of Judgment creditors can over-ride this agreement. Under the Col. Statute, tit. xxx. c. 113, s. 10, nothing could be sold by the Sheriff but the interest of the debtor, and the interest of the Company is an interest subject to the agreement with the Debenture-holders. In *Beavan v. The Earl of Oxford* (a), it was held that a Judgment creditor was not a purchaser within the meaning of the Statute, 27 *Eliz.* c. 4, and had no title to set aside a voluntary deed. *Whitworth v. Gaugain* (b), was a suit by an equitable Mortgagee against a Judgment creditor of the Mortgagor, who had obtained possession of the mortgaged estates under *elegits*, and the Court held that the Plaintiff acquired a special lien on the property, and that a judgment had relation to the time it was entered up, and did not affect any *bonâ fide* conveyance made before that time. Assuming then that the judgments were properly registered, as required by the registration laws of *New Brunswick*, they would only affect property which the debtor was lawfully possessed of at the date of the judgment, and could not displace a previous equitable mortgagee: *Benham v. Keane* (c); *Eyre v. M'Dowell* (d); where the authorities on this point are all collected. Even if the interest of the Company in the lands was sold under the Colonial Statute, tit.

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(a) 6 D. G. M. & G. 507.

(b) 1 Ph. 728. S. C.; 3 Hare, 416; Cr. & Ph. 325.

(c) 1 J. & H. 685.

(d) 9 H. L. Cases, 619.

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xxx. c. 113, s. 6, such interest could only be sold as personal estate, for, according to the law of *New Brunswick*, freehold lands of a debtor are saleable under a *fiery facias*; and as soon as the lands are converted into personalty, the right of the Debenture-holders, even if they had none to the land when in specie, attaches. Under section 10 of the same Statute nothing can be sold but the interest of the debtor, and the interest of the Company in these lands was an interest subject to the agreement with the Debenture-holders. If the Debenture-holders have no charge on the lands, neither have the Judgment creditors; for they also could only call on the Sheriffs to sell the interest of the debtors in land as personal estate. The position, therefore, of the parties is that the Debenture-holder has an agreement with the Company, by which the Company is trustee of the land with power to sell it, and must hold the proceeds as trustee for the Debenture-holder, while the Judgment creditor has a right subsequently acquired, to have the interest in the Company in the lands sold, and the proceeds paid to him. Each party is, therefore, entitled only to receive the proceeds, and the Debenture-holder, being prior in time, has the priority in right.

Secondly. There was no necessity to register these debentures as against Judgment creditor. A judgment can only affect the interest which the debtor has in land: *Rose v. Watson* (a). Section 4 of the revised Statutes of *New Brunswick*, tit. xxx. c. 112, provides that all conveyances, memorials of judgments, or other instruments by which any lands may be affected, shall be registered; and if not so registered,

(a) 10 H. L. Cases, 672.

shall be fraudulent and void against subsequent purchasers for valuable consideration whose conveyances are previously registered, and by tit. xli. c. 161, s. 7, a conveyance is defined to mean any instrument by which any freehold, leasehold estate, or interest in real estate may be transferred or affected. Here registration is not required, for a judgment creditor is not a purchaser. Notice does not affect a judgment creditor claiming interest in land by contract.

The Attorney-General (Sir *R. Palmer*), and Mr. *Wickens*, for the Respondents.

These Debentures, or mortgage bonds, as they are called, create no charge on the lands advertised for sale by the Sheriffs. The question as to what interest the Debenture-holders take, in a great measure depends upon the construction of the agreement, the Statute, 21st & 22nd *Vict.*, c. 154, carrying out that agreement and the language of the Debentures. By that Statute the "undertaking" of *St. Andrew's* and *Quebec* Railway Company was transferred to the *New Brunswick* and *Canada* Railway and Land Company. The word "undertaking" is a general expression, and its meaning must be ascertained from the intention manifested in the agreement and Statute. All that the Debentures affect to transfer to the Debenture-holders is the "undertaking" of the Company, and the money to arise from the sale of the land, tolls, &c.; but these words do not give the Debenture-holders or confer on them any legal title to restrain the sale of the lands in the hands of the Sheriff for the judgment creditors; neither does the proviso authorizing them to enter upon the undertaking and into the receipt of the pro-

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ceeds of the sales, give them a charge upon the lands. The case of *Doe dem Wyatt v. The St. Helens and Run-corn Gap Railway Company* (a) is on all fours with the present case. That was an action of ejectment brought by a mortgagee of the "undertaking," and, as in this case, turned upon the meaning of that word, and the court of the Queen's Bench held that the word "undertaking" did not give to the mortgagee such an interest as would enable him to maintain ejectment. Land of a Railway Company is not included in a Mortgage by the Company under such a term, and cannot pass: *Russell v. The East Anglian Railway Company* (b); *Fripp v. The Chard Railway Company* (c). In equity a covenant to settle on A. lands of a certain yearly value without mentioning any lands certain, will not create a specific lien: *Fremoult v. Dedire* (d); *Berrington v. Evans* (e). Even if the debentures were effectual to create a charge on land, they were not registered as required by the law of *New Brunswick*, Revised Statutes, tit. xxx. c. 112, s. 4, and on that ground are inoperative against the Respondents as judgment creditors.

But there is no precedent for such a bill as this to restrain the Sheriffs selling the lands. In the case of an ordinary Mortgagee it certainly would not lie; and as to the alleged equitable right, there is no relation subsisting between the Debenture-holders and the judgment creditors to affect a trust in their favour upon the proceeds of sale of the lands. There is no allegation in the bill of any equitable ground whatever for interfering with the ordinary remedies of the Re-

(a) 2 Q. B. Rep. 364.

(b) 3 Mac. & Gor. 125.

(c) 11 Hare, 241.

(d) 1 P. Wms. 429.

(e) 3 Y. & C. 384.

spondents as execution creditors according to the laws prevailing in *New Brunswick*.

Their Lordships' judgment was delivered by

LORD CHELMSFORD :—

This is an appeal from an order made by the Supreme Court of Judicature of *New Brunswick*, affirming an order made by a single judge of that Court refusing a motion for an injunction to restrain the Defendants in the suit from selling, and, if allowed to sell, from paying over the proceeds of the sale of lands of the *New Brunswick and Canada Railway and Land Company* to certain judgment creditors of the said Company upon whose judgments executions had issued, and in the event of a sale to restrain the Sheriffs from paying over the proceeds of the sale to the judgment creditors, and to order such proceeds to be paid over to a Receiver previously appointed on the application of the Plaintiffs.

The Plaintiffs were the holders of certain mortgage Debentures granted by the Company, and claimed under the terms of those Debentures to have a right to prevent the sale of the lands under the executions issued by the Defendants, the judgment creditors, or at all events to be entitled to the proceeds of such sale.

There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff, with all the charges and encumbrances, legal

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and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take. This case, therefore, depends entirely upon the question, what, as between the *New Brunswick* and *Canada* Railway Company and the Debenture-holders, was the interest which the Company had in the lands taken in execution by the judgment creditors. The title of the Company depends upon a private Act of the Imperial Legislature, 21st & 22nd Vict., c. 154, by which the undertaking of the *St. Andrew's* and *Quebec* Railroad Company was transferred to them in pursuance of an agreement entered into between the two companies which is set out in the schedule to the Act.

Under this agreement the shares of a class of shareholders in the *St. Andrew's* and *Quebec* Company, called the Class A. Company, were to be transferred to the Transferee Company, and the Class A. Company were to be entitled to receive the quantity of 42,670 acres, in addition to a quantity of 20,630 acres, already granted to them. And the Transferee Company were to be entitled to appropriate out of the lands to be granted to them, 16,000 acres of land in respect of their Class A. shares, and 105,000 acres in respect of their Class B. shares.

Both in the agreement and in the Act confirming it a marked distinction appears to be made between the undertaking itself of the *St. Andrew's* and *Quebec* Railroad Company and the lands and other property belonging to the Company. In the agreement the companies mutually agree with each other that the undertaking of the *St. Andrew's* and *Quebec* Railroad Company, and the control and management thereof

(i.e., of the undertaking), "and all the lands, goods, chattels, and present and future property and effects, rights and expectancies of the *St. Andrew's* and *Quebec* Railroad Company shall be and are hereby transferred to the Transferee Company." And the third section of the Act confirms the agreement in these words: "the transfer by the same agreement of the said undertaking and of the said lands, rights, and expectancies to the Company is hereby confirmed, and the same undertaking, lands, rights, and expectancies shall from and after the passing of this Act be vested in the Company." It will be necessary to bear this distinction in mind in determining what were the rights which were acquired by the Appellants under the terms of the Debentures issued by the Company.

The Company, it appears, was by its constitution a Land as well as a Railway Company. Of course it was essential to the carrying out of the objects of this part of their undertaking that they should have the power of dealing freely with the lands belonging to them, and as they were also to be entitled to appropriate a large quantity of these lands to their shareholders, that they should not be restricted in the exercise of this right of appropriation.

The Debentures which the Company issued to the Appellants, and others, seem to have been framed with a special view to these objects.

The one given to Mr. *Wickham*, one of the Appellants, is printed in the proceedings as a specimen of them all. It is termed an Indenture of mortgage, dated *May* 29th, 1862, made between the Company of the one part, and Mr. *Wickham* of the other part. It recites the advance by him of £1,000, to the Company, on condition that they will repay the same

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to him on the 1st of *January*, 1867, with interest in the meantime at the rate of 6 per cent. per annum, by equal half-yearly payments on the 1st of *July*, and the 1st of *January* in every year. It then proceeds: "Now it is hereby witnessed, that for securing the said advance and interest, the said Company hereby grant to the said *Henry Wickham Wickham*, his executors, administrators, and assigns, the undertaking of the said *New Brunswick and Canada Railway and Land Company*, and all moneys to arise from the sale of the lands of the said Company for the time being, and all future calls on shareholders of the said Company, and all the tolls and sums of money which shall become due to the said Company, including the provisional guarantee, and also all engines, tenders, passenger and other cars, and every description of rolling stock, rails, sleepers, goods, and chattels, of the said Company, whatsoever or wheresoever being, and all the estate, right, title, and interest of the said Company in the same."

It is then declared that if the Company fails in paying the said principal or interest moneys on the days specified for payment, Mr. *Wickham* may, upon giving three months' notice to the Company, enter upon the receipt of the said proceeds of sales, tolls, calls, and sums of money, which may thereafter become due to the said Company in any manner from or in respect of the said undertaking, and upon the absolute possession of the said engines, tenders, cars, rolling-stock, rails, sleepers, goods, and chattels of the said Company before mentioned, and the said road and the entire charge, control, and working thereof, and reimburse himself thereout the sums due upon his security and his expenses. And the debenture

closes with a proviso in these terms: "Provided also, that nothing herein contained shall be held to limit the power of sale or appropriation by the said Company of any of the lands of the said Company, nor constitute a charge upon the same."

It was contended on the part of the Appellants that these Debentures transferred to the mortgagees all the property of the Company without any exception; for that the undertaking itself being granted, the lands which are a portion of the undertaking must necessarily pass under that word. On the other side, the case of *Doe dem Myatt v. The St. Helen's and Runcorn Gap Railway Company* (a) was cited to show that the mortgage by a railway company of their undertaking did not give the mortgagee any title to land so as to enable him to maintain ejectment. That case did not determine that the conveyance of an undertaking by a railway company would in no case carry the land; but, as was said by Mr. Justice Coleridge, "The word is ambiguous and may be construed as meaning the speculation generally, or possibly it might be taken to include the land itself."

Having, then, no certain and settled meaning, when this word is used in any conveyance of property by a Company, it must be construed according to the obvious intention of those who employ it.

As a guide to its meaning in the Debentures in question, reference may again be made to the agreement, and the Act transferring the undertaking to the *New Brunswick and Canada Company*, and to the manner in which the undertaking and the lands are in expression (at least) distinguished from each other.

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(a) 2 Q. B. Rep. 364.

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Turning from them to the debenture, it will appear that this distinction is not only preserved but strengthened. For as if to show in the clearest manner that the word "undertaking" was not intended to include the lands belonging to the Company, it is immediately followed by a grant of all moneys to arise from the sale of such lands. Now if it was intended to comprehend the lands themselves in the mortgage Debentures, or if the word "undertaking" would *ex vi termini* contain them, the Debenture-holders would not only have been entitled to, but would have had the complete control over, the proceeds of the sales of lands, as the Company could not have sold without their consent, and it would, therefore, have been quite unnecessary to provide specifically for their having the moneys to arise from the sales. It ought, perhaps, also to be noticed that even when provision is made for the default of the Company by non-payment of the principal or interest secured by the Debentures, the right of entry which is given to the Debenture-holders is not upon the lands themselves, but only upon the receipt of proceeds of sales. But if any doubt exists upon these terms of the Debenture the proviso must entirely remove it. It has been already observed that the Company is a land Company, whose very object is to deal with and dispose of lands, and that it has a right to appropriate portions of these lands to its shareholders. With these operations, any interest in or charge upon the lands would materially interfere. The words of the Debenture are so sweeping and general that it might well be supposed they would give the mortgagees the right to every description of property belonging to the Company. Therefore, to prevent any misconception, the proviso in

express and clear terms says to the Mortgagees, what has been previously granted to you shall not limit the power of sale or appropriation by the Company of any of the lands of the Company, nor constitute a charge upon the same. In this view the proviso is not inconsistent with, but merely explanatory of, what has gone before; but, according to the Appellants, the meaning of the proviso is, that although all the lands are granted to the Debenture-holders, yet in every instance in which the Company wishes to exercise its powers of sale or of appropriation the charge upon the particular lands is to be withdrawn, but to remain upon the unsold and unappropriated residue. It is not, however, usual to treat the actual right to lands as a mere charge upon them: and as the power of sale and appropriation extends to any and all of the lands of the Company, it does seem unreasonable, upon the Appellant's construction, that all the lands should be given to the Mortgagees as a part of their security, and a power left in the Company immediately to take them all away again. It seems clear to their Lordships that the lands not being in terms granted by the Mortgage debentures, the proviso makes the intention of the parties perfectly clear that no general expression used in the grant was intended to comprehend them, and therefore that the Debenture-holders are not entitled to interfere with the sale of the lands under the execution issued by the judgment creditors.

But the Debenture-holders insist that if they cannot stop the sale of the lands, they are entitled, under the terms of their Debentures, to all the moneys arising from such sale. It is quite clear, however, that the sales contemplated by the grant are those which are

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to be made by the Company in the course of their regular operations. It was contended, on the part of the Appellants, that the sale under the execution would be virtually a sale by the Company, as the title of the judgment creditors is derived from them. But that is not so. The judgment creditors take what belonged to the Company, but do not take under them; and a sale by the Sheriff under an execution is a sale by the law, and not by the Company.

It is clear, upon the whole case, that the lands of the Company did not pass to the Mortgagees under the Debentures, nor are they entitled to the proceeds of the forced sales.

Their Lordships will, therefore, recommend to Her Majesty that the decree appealed from be affirmed, and the appeal be dismissed with costs.

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ON APPEAL FROM THE SUPREME COURT  
OF THE PROVINCE OF SOUTH AUS-  
TRALIA.

THE QUEEN - - - - - *Appellant* ;

AND

WALTER WATSON HUGHES and }  
EDWARD STIRLING - - - - } *Respondents.\**

THIS was an appeal against a decision of the Supreme Court of the Province of *South Australia*, making absolute a rule obtained by the Respondents for quashing a writ of *Scire facias* issued out of that Court at the suit of the Appellant, on the prosecution of *Samuel Mills*, whereby the Respondents were commanded to show cause why certain leases granted by the Governor of the Colony of *South Australia* to the Respondents should not be declared void. The question raised by the rule, although affecting the

20th, 21st, &  
22nd Dec.  
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*Leases*  
granted by  
the Governor  
of *South*  
*Australia*  
under powers  
conferred on  
him by the  
Colonial Act,  
21st Vict. No.  
5, sec. 13, for  
regulating  
the sale and  
other disposal  
of waste lands  
belonging to  
the Crown,  
sealed with  
the public

\* Present :—Lord Chelmsford, Sir James W. Colvile, and Sir Edward Vaughan Williams.

seal of the Province, but not enrolled or recorded in any court, are not in themselves Records ; and, though bad on the face of them, being for a larger quantity of land than allowed by that Act, cannot be annulled or quashed by a writ of *Scire facias*.

Such writ is a prerogative judicial writ which must be founded on a Record, and cannot under the constitution of the Supreme Court in *South Australia* issue out of that Court.

The proper remedy for an unauthorized possession of lands of the Crown in the Colony is by an information in Chancery, or Writ of intrusion.

The case of *The Queen v. Clarke* (7 Moore's P. C., Cases, 77,) commented on and explained.



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rights of the Crown and the validity of the leases was narrowed in the first instance, both in the Court below and on the appeal, to the power of the Supreme Court of *South Australia*, to issue the writ of *Scire facias* to annul grants or leases of Crown lands within that Province.

The grants sought to be annulled were made by twelve Indentures of lease, two of which were dated on the 7th of *September*, and the remaining ten on the 22nd of *October*, 1861; and all of which were made between Her Majesty the Queen, of the first part, Sir *Richard Graves MacDonnell*, Captain-General and Governor in Chief of the Province of *South Australia*, of the second part, and the Respondents of the third part; and by such Indentures, in consideration of the respective rents thereby reserved to Her Majesty, Her heirs, successors, and assigns (being in each case the minimum rent of 10s. per acre required to be reserved by the local Act called the *Waste Lands Act*, 21st *Vict.*, No. 5, sec. 13), and of the reservations, covenants, and agreements to and with Her Majesty, Her heirs, successors, and assigns, thereby made and entered into, divers portions of the waste lands of the Crown within that Province were expressed to be demised by the Governor, under and in pursuance of the powers and regulations of the aforesaid Act, to the Respondents, their executors, administrators, and assigns, for the purposes of mining, for the respective terms of fourteen years from the dates of the Indentures, with such right of renewal as therein mentioned.

These Indentures were sealed with the public seal of the Province, and were signed and executed in the name and on behalf of Her Majesty by the

Governor of the Province, in accordance with the provisions of the before-mentioned Waste Lands Act, but were not filed or recorded in the Supreme Court.

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It was alleged on the part of *Mills*, the Prosecutor of the writ of *Scire facias*, that the Indentures of lease or grant of the 7th of *September*, 1861, and the 22nd of *October*, 1861, did not comply with the provisions of the Waste Lands Act and the regulations made in pursuance thereof, and were obtained by the Respondents by false representations and upon false suggestions, which were set out in the writ of *Scire facias*, and that the Indentures were not good and valid grants of the portions of waste lands of the Crown purporting to be thereby demised, and that the same ought, therefore, to be annulled.

The Supreme Court of the Province was established by a Provincial Act, 17th *Vict.*, No. 31, as a Court of Record, with all the jurisdiction, within the Province and its dependencies, the Courts of Queen's Bench, Common Pleas, and Exchequer have in *England*, and also as a Court of Oyer and Terminer and gaol delivery, and as a Court of Equity in the Province and its dependencies, with all the jurisdiction of the Court of Chancery. The 16th section of the Act, gave the Judges of the Supreme Court power to make rules and orders concerning the practice and procedure of the Court.

No Act of the Imperial or Colonial Legislature gave the Governor of the Colony authority in the matter of writs for repealing grants from the Crown, nor had there been any legislation in the Colony in reference thereto, nor was any power given in express terms to the Supreme Court, to issue writs of *Scire facias*. Except the Supreme Court, there is no other Court

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in the province of *South Australia* out of which a writ of *Scire facias* to annul a Crown grant within the province could issue.

On the 16th of *September*, 1864, *Mills* presented a petition to Sir *Dominick Daly*, the then Governor of the Province, in which it was alleged that the several leases above mentioned ought not to have been granted to the Respondents, and were contrary to law.

By a warrant under the hand of the Governor, and sealed with the public seal of *South Australia*, bearing date the 2nd of *March*, 1864, and directed to the Attorney-General for the Province, the Governor authorized and required the Attorney-General to sue out in the name of the Crown a writ of *Scire facias* for the purpose of compelling the Respondents and all other persons claiming under them, to show cause why the Indentures of lease should not be declared void and annulled.

In pursuance of the warrant and fiat, a writ of *Scire facias* was on the same day issued out of the Supreme Court, directed to the Sheriff, who, on the 28th of *April*, 1864, made his return to the writ.

On the 29th of *May*, 1864, a rule *nisi* was obtained by the Respondents for quashing the writ of *Scire facias*, on the grounds, first, that the Supreme Court had no jurisdiction to issue a *Scire facias* for annulling a Crown grant. Secondly, that there was no record in the Supreme Court of *South Australia* whereon to ground such writ. Third, that it did not appear by the records of the Supreme Court that the authority of Her Majesty's Attorney-General in the Colony had been obtained prior to the issuing of such writ. Fourth, that the writ did not sufficiently disclose that

the prosecutor was a party damnified. Fifth, that the writ did not set forth any record for annulling of which it had been issued ; and sixth, that the writ was wrongly tested.

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On the 29th of *August*, 1864, the Supreme Court gave judgment on this rule in favour of the Respondents. Two of the Judges (Mr. Justice *Gwynne* and Mr. Justice *Boothby*) being of opinion that, as there was no record to ground the proceedings, the writ must be quashed : the Chief Justice (The Hon. *Richard Davies Hansom*) dissented, holding that grants from the Crown in the Colony, under the public seal of the Colony, were records ; whereupon the rule was made absolute.

From this judgment the present appeal was brought. It was assumed for the purposes of the appeal that the leases in question were void, being for quantities of land exceeding eighty acres, the limit named in the 13th section of the Waste Lands Act, 21st *Vict.*, No. 5.

Sir *Hugh Cairns*, Q.C., Mr. *Mellish*, Q.C., and Mr. *G. W. Mounsey*, for the Appellant.

This is a question of the utmost importance regarding the interests of the Crown and the inhabitants of the Colony. Though in form it relates to the jurisdiction of the Supreme Court, in substance, it affects durably the interests of the Crown as well as the interests and the individual rights of the subject ; for if the right of *Scire facias*, enjoyed and exercised as a prerogative by the Crown from the very earliest times, and still subsisting in full vigour, can be taken away, not by direct legislation, but indirectly, this branch of the prerogative, intended as much for the protection of public interests as individual rights,

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and which in many cases affords the only remedy either for the Crown or the subject, becomes a dead letter as far as Her Majesty's Colonies are concerned. Now, the property in the waste lands comprised in the Indentures of lease was at their date vested in the Crown. There is no doubt of that. The leases were executed by the Governor in the name and on behalf of Her Majesty, in pursuance of and accordance with the provisions of the Waste Lands Act, 21st *Vict.*, No. 5. They were sealed with the public seal of the Province, which is equivalent to the Great Seal, and being grants of the Crown were to all intents and purposes Records sufficient to found thereon the writ of *Scire facias*. There is no provision in the Waste Lands Act, or by the rules of the Supreme Court, which required the enrolment of the grants; nor is such enrolment, in the circumstances, necessary to give the Supreme Court authority to issue the writ of *Scire facias*, which is the proper, and only remedy, for setting such leases aside: 4 Inst. 72; *Rex v. Sir Oliver Butler* (a). The Queen has by Common law, *jure regio*, an undoubted right to proceed by *Scire facias*, if she has been deceived in Her grant, or if Her subjects have been prejudiced thereby: 4 Inst. 88; *Magdalen College Case* (b); *Bynner v. The Queen* (c). The case of *The Queen v. Clarke* (d) is precisely in point. There a grant similar to these, made by the Governor of the Colony of *New Zealand*, which exceeded, as we allege here, the amount of land prescribed by the Local Ordinance, was upon a *Scire facias* held void, and such decision was confirmed by this Court. Here the writ was duly

(a) 9 Lev. 220.

(b) 11 Co. Rep. 75.

(c) 9 Q. B. Rep. 523, 529.

(d) 7 Moore's P. C. Cases, 77.

authorized by the only Court out of which it could issue on the fiat of the Attorney-General, and we submit that the grounds stated for making absolute the rule for quashing the writ were insufficient to support such a rule.

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The Attorney-General (Sir. *R. Palmer*), Mr. *Rolt*, Q.C., and Mr. *Macnamara*, for the Respondents.

The writ of *Scire facias* is wholly inapplicable to the laws and constitutions of the Colony. There is no Officer or Court in the Colony having jurisdiction to issue such a writ. It is a judicial and high prerogative writ, and cannot be granted but upon a record. *Bac. Abr. tit. Scire facias* (A), 2 Inst., 470. 2 *Wm.'s Saund.*, p. 71, note (4). *Forster on Scire facias*, 2. Grants of Crown lands in the Colonies are not Records, they are not Patents, nor are they proceedings of a Court of Record, or enrolled, which is necessary to constitute them Records. *Com. Dig. tit. Record* (A); *Ib. tit. Patent* (F. 7.); *Hindmarch on Patents*, p. 37-9; 3 Inst. 71. Crown grants of land can only be made by Letters patent under the Great seal, which are Records without further proof, being enrolled in the High Court of Chancery, from whence they issued: *Co. Litt.* 16; *Vin, Abr. tit. Prerog.* (C); *Peake on Evidence*, 31, note c. (4th ed.); 2 *Bla. Comm.* 346; *Doc. & Stud. B. I. dial.* 8. *Chitty on Prerog.* 331. The leases here were not grants at all, they are only statutory assurances, made by the Governor in execution of the powers conferred on him by the Waste Lands Act, in the name, but not on behalf, of the Sovereign, as if by Letters patent enrolled; grants they cannot be, but they may be of the same

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nature as leases granted here by the office of Woods and Forests. The seal of the Governor is not equivalent to the Great seal; he has no Sovereign authority and an act done by him unauthorized by his commission is void: *Cameron v. Kyte (a)*. In the making of the leases he could only act under the authority of the Colonial Act.

In our Colonies, questions regarding the title of lands are to be decided, in the first instance, by the Court of Local judicature, from whence an appeal lies to Her Majesty in Council: *Attorney-General v. Stewart (b)*. This must be done in the ordinary mode of procedure; there is no instance of such a proceeding as this in the Colonies. The case of *The Queen v. Clarke (c)* does not apply; it was heard *ex parte*, and the right of the Governor of New Zealand to make grants at all of waste land was not questioned, though the particular grant in question was held to be in excess; that was the point determined, and no reference was made, or required to be made, to the irregularity of the proceeding by *Scire facias*. There is no authority or machinery in the Supreme Court for the issuing of a writ of *Scire facias*.

There were other remedies to which resort might have been had: the parties might have proceeded by Bill in equity, to set aside the grants as unduly obtained: *Sawyer v. Vernon (d)*; *Attorney-General v. Chamberlain (e)*; *Alcock v. Cooke (f)*; or, as in the case of a grant under the Duchy Seal of Lancaster, of a Manor with certain rights, where the question was raised in an action of trover; or by Information of intrusion.

(a) 3 Knapp's P. C. Cases, 352. (b) 2 Mer. 143.

(c) 7 Moore's P. C. Cases, 77. (d) 1 Vern. 370.

(e) 4 D. M. & G. 206. (f) 5 Bing. 340.

*Chalmers' Opinions*, vol. i. p. 160, where the very case is put of error on the face of the grant; or by Writ of intrusion, *Chitty on Prerog.*, 332-3.

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But the writ itself was invalid, being tested in the name of the Chief Justice of the Supreme Court, that Court having no authority to issue the writ. The trial of the question at issue in this case would put the Respondents under great and very unfair advantages, and neither the Crown nor any one entitled to impeach the Indentures of lease, are without remedy, although there is no jurisdiction in the Colony to issue the writ of *Scire facias*.

Lord CHELMSFORD :—

This is an appeal against a rule of the Supreme Court of the Province of *South Australia*, making absolute a rule of the same Court obtained by the Respondents, for quashing a writ of *Scire facias*, issued for the purpose of revoking certain leases of Crown Lands granted by the Governor of the Province to the Respondents.

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The question raised by the rule, and to be decided upon the appeal, is whether the Supreme Court of *South Australia* had jurisdiction to proceed by writ of *Scire facias* to annul grants or leases of Crown lands within the Province.

The writ of *Scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record. These Crown grants and charters under the Great seal are always sealed in the Petty Bag Office, which is on the Common Law side of the Court of Chancery, and become Records there.



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Whether grants would be Records by the mere act of sealing without enrolment in the Court, it is unnecessary to consider, because in point of fact such grants are invariably enrolled. They are then at all events brought within the definition of a Record given in *Com. Dig.*, tit. Record (A), upon the authority of *Co. Litt.* 260A, viz., "A memorial of an Act or proceeding of a Court of Record proceeding according to the course of the common law, entered on parchment for the preservation of it." All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *Scire facias*. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For, as was said by Chief Justice *Jervis*, in the case of *The Eastern Archipelago Company v. The Queen* (2 E. & B. 94) "To every Crown grant there is annexed by the Common law an implied condition that it may be repealed by *Scire facias* by the Crown, or by a Subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General."

This being the long-settled and well-known rule of proceeding with respect to Crown grants in this country, the question to be determined is whether grants and leases of Crown lands in *South Australia* are of such an analogous character and description as to be necessarily subject to the same remedial process of *Scire facias* for their repeal.

The first thing to be considered is the constitution of the Supreme Court in the Province. This was settled by a Colonial Act, 17th *Vict.*, No. 31, 1856.

intituled "An Act to consolidate the several Ordinances relating to the establishment of the Supreme Court of the Province of *South Australia*." By the 7th section of that Act, the Court is constituted a Court of Record, and is to have cognizance of all pleas, civil, criminal, and mixed, and jurisdiction in all cases whatsoever, as fully and amply in the Province and its dependencies as Her Majesty's Courts of King's Bench, Common Pleas, and Exchequer at *Westminster*, or either of them, lawfully have or hath in *England*. And by the 8th section, it is enacted "that the Supreme Court shall be a Court of Equity in this Province and its dependencies, and shall have power and authority to administer justice, and to exercise and perform all such acts, matters, and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of *Great Britain* can or lawfully may within the realm of *England*; and all such acts, matters, and things as lawfully can or may be done by the said Lord High Chancellor within the realm of *England* in the exercise of the jurisdiction to him belonging." The 16th section gives the Judges of the Supreme Court power to make and practise (probably a misprint for "frame") general rules and orders "touching and concerning the time and practice of holding the Courts, the forms and manners of proceeding, and the practice and pleading upon all indictments, informations, actions, suits and other matters to be brought therein." Whether, under the powers conferred by this section, it would have been competent to the Judges to have made a rule for "the form and manner of proceeding" in suits to revoke grants of Crown lands, and to have ordered that the remedy

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by *Scire facias* should be applicable to such cases, it is unnecessary to consider. They have not done so. They have promulgated a rule as to the test of writs of *Scire facias*, but as that process is applicable to other objects besides the grants of Crown lands (such as recognizances and judgments), the right to use it in order to annul the leases in question must depend upon whether the grants are of the peculiar nature and character to render them a proper foundation for this particular remedy.

The leases were granted by the Governor under the powers conferred upon him by a Colonial Act 21st Vict., No. 5, of 1857, intituled, "An Act for regulating the sale and other disposal of waste lands belonging to the Crown in *South Australia*." By the first section of this Act, "All the waste lands of the Crown within the Province are to be disposed of in the manner and according to the regulations therein provided, and not otherwise." The absolute sale of these lands is provided for by the 5th section in these terms, "Under and subject to the various provisions and regulations hereinafter contained, the Governor is hereby authorized and required, in the name and on the behalf of Her Majesty, to convey and alienate in fee simple, or for any less estate or interest to the purchaser or purchasers thereof, any waste lands of the Crown in the said Province, which conveyances and alienations shall be made in such forms as shall from time to time, be deemed expedient by the Governor with the consent of the Executive Council, and shall be sealed with the public seal of the said Province."

There can be no doubt that under the words, "in fee simple or for any less estate or interest," in this

section, the Governor might have granted leases of the Crown lands "in the name and on the behalf of Her Majesty." But the leases in question were made by the Governor himself under the authority of the 13th section of the Act, which enacts that "it shall be lawful for the Governor to demise for the purposes of mining for any metal or mineral (excepting gold) to any person applying for the same, any portion of the waste lands of the Crown within the said Province, not exceeding eighty acres, for any period not exceeding fourteen years, at an annual rent of 10s. per acre, &c. ; subject to such regulations for the granting of such leases, and for the working and resumption of the same, as may, from time to time, be in that respect made by the Governor with the advice and consent of the Executive Council." The leases described in this section are not required to be under the Provincial seal ; and although the leases in question were so sealed, the authority would probably have been as strictly pursued if they had been executed under the private seal of the Governor.

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It may be assumed for the purposes of the present case that these leases are void, being of quantities of lands exceeding eighty acres ; and the Appellant insists that the remedy by *Scire facias* is not only the proper, but the only remedy for setting them aside.

It was contended, in the first place, that these leases were virtually Records. That the Governor was entrusted with all the ministerial duties of putting the Provincial seal (the Queen's seal of the Province) to grants of Crown lands. That the Supreme Court besides being a Court of Record is also a Court of Equity, and can perform "all such acts, matters, and things as lawfully can or may be done

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by the Lord High Chancellor within the realm of *England*, in the exercise of the jurisdiction to him belonging."

The meaning of this argument seems to be that all the machinery existed in the Province for placing grants of Crown lands on the same footing with those in this country, both in their original creation and for constituting them a Record. But it was not pretended that any enrolment of them had taken place, and it, therefore, became necessary for the Appellant to insist that the leases were in themselves Records. With this view it was asserted that every grant under the Great seal is *ipso facto* a Record, and that the seal of the Province, which was entrusted to the Governor by the Queen's commission for the purpose of making grants in Her Majesty's name, is equivalent to the Great seal. Assuming this to be the case, it would advance the argument a very short way, unless it could be established that the mere affixing the seal to an instrument by the Governor at once made it a Record. But a Record (to recur to the definition of it given in *Comyn's Digest*) must be "A memorial of an Act or proceeding of a Court of Record," and when it is asserted that when the seal of the Province is affixed to a lease by the Governor it becomes a Record, it may not unreasonably be asked, a Record of what Court? It must be borne in mind that the Governor in granting these leases was not exercising any delegated authority from the Crown, but a mere statutory power conferred upon him to demise in his own name.

But it was contended that, if these leases were not Records, and consequently not in every respect assimilated to royal grants, yet that form must yield to

substance; and when grants of Crown lands were introduced into *South Australia*, they were necessarily accompanied with all their incidents, one of which is the right of a subject who receives prejudice from them to invoke the aid of the writ of *Scire facias* for their repeal. And that if persons injured by these grants were debarred from this mode of proceeding, they would be remediless. To this it was correctly answered that the question of the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. And that, however convenient or necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the Court to sanction its introduction.

But it was further argued on the part of the Respondents, that, even if *Scire facias* does not lie in this case, the Appellant will not be without remedy, as the leases may be impeached either by a writ of intrusion, or an information in chancery. It was denied by the Appellant that these remedies existed; but it was said that, even if they did, they were inefficacious, as a subject has not a right to them *ex debito justitiæ*, as he has to a writ of *Scire facias*. But assuming this to be correct, it would furnish no ground for the unauthorized introduction of a remedy to meet a particular occasion.

There can be no doubt, however, that the other modes of proceeding pointed out by the Respondents are applicable to the grant of the leases in question. The writ of intrusion lies in every case in which a trespass is committed on the lands of the Crown, or a person enters on the same without title. And the information in chancery may be used to assert the

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Crown's right to property, as it was in the case of the *Attorney-General v. Chambers* (4 D. G. M. & G. 206), upon a question of the right of the Crown to the shore between high and low water mark.

In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. This quantity is said to be exceeded in the Leases in question; if so, they are altogether void, and the lessees are intruders upon the lands. The remedies which have just been adverted to are, therefore, strictly applicable to the Respondents' unauthorized possession of the lands of the Crown.

In the argument for the Appellant, the case of *The Queen v. Clarke* (7 Moore's P. C. Cases, 77), was relied upon. That was a proceeding in *Scire facias* to annul a grant of Crown lands in New Zealand, where the Judicial Committee upon appeal recommended that judgment should be entered for the Crown. This, it was insisted, is an express decision that *Scire facias* will lie although there is no record. In the judgment of the learned Chief Justice of the Supreme Court the case is treated as a conclusive authority in favour of the promoters of the *Scire facias*. But it appears to their Lordships that it cannot properly be regarded as a determination of the question. From the beginning to the end of that case there was nothing to raise any doubt as to the propriety of the proceeding by *Scire facias*. No objection was taken to it in the Colony. Not the slightest suggestion was offered upon the subject in the course of the argument upon the appeal. The

hearing before the Judicial Committee was *ex parte*, the Respondent not having appeared, and the attention of their Lordships was not in any way called to the irregularity of the proceeding in the validity of which they are supposed by their silence to have acquiesced. Even if the point occurred to their own minds, they might very fairly have inferred from the absence of all objection in the Supreme Court of *New Zealand* that the proceeding by *Scire facias* to annul grants of Crown lands was proper in that Colony, either from the grants being made records of the Court or from the Judges having power to make rules as to the form and manner of proceeding, and having authorized the process of *Scire facias* in the case of Crown grants.

The presumption arising from the clause in the Act, 1859, No. 18, authorizing the Governor to grant letters of registration for inventions, which expressly makes them liable to be repealed by writ of *Scire facias*, is unfavourable to the Appellant's argument. It may not unreasonably be supposed, that the Legislature never contemplated that grants or leases of waste lands would be made improvidently by the Governor, and would require to be recalled. But grants of monopolies to exercise inventions were likely to be occasionally prejudicial to private interests, and, therefore, it was thought expedient to give the subject the protection of this prerogative remedy.

If from the experience of the present case it should be thought desirable that the writ of *Scire facias* should be made available for the repeal of Crown grants the Judges appear to have the power, under the Provincial Act "for consolidating the several Ordinances relating to the establishment of the

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Supreme Court," to promulgate a rule that the form and manner of proceeding in these cases may be by *Scire facias*. Or if there be any doubt of the sufficiency of such a rule, the remedy may, as in the case of letters of registration for inventions, be given by the Legislature. All difficulty for the future will thus be removed.

Their Lordships being of opinion that the rule granted by the Supreme Court for quashing the writ of *Scire facias* was rightly made absolute, will recommend to Her Majesty that the appeal against it be dismissed with costs.

## IN THE MATTER OF THE JERSEY JURATS.

### ON PETITION FROM THE ISLAND OF JERSEY.\*

17th & 18th  
Jan. 1866.

By the constitution and law of the Island of Jersey, the Royal Court is composed of a Bailiff and twelve *Jurats*, and

upon the voluntary resignation of a *Jurat* it is the prerogative of the Crown to permit such resignation, and to authorize a new election to fill up the vacancy so occasioned.

*Secus*, on a vacancy occasioned by the death of a *Jurat*, when the Royal Court have power alone to order a new election.

The States of Jersey passed two *Actes* accepting the resignation of two *Jurats* on the ground of their length of service and inability to continue to perform the duties of their office. These *Actes* were objected to by certain landowners and others in the Island, who petitioned the Crown against confirming the same, and to suspend the filling up of those offices until a reform, long in contemplation, of the Royal

THIS was a petition and representation of the States of Jersey to Her Majesty in Council in support of two

\* Present:—The Lord President (The Earl Granville), the Lord Chancellor (Lord Cranworth), Lord Chelmsford, the Right Hon. Sir George Grey, and the Right Hon J. A. Bruce.

*Assessors*:—The Attorney-General (Sir R. Palmer), and the Queen's Advocate (Sir R. Phillimore).

*Actes* of the States, dated the 14th and 29th day of January, 1864, for obtaining new elections of *Jurats* in the room of *Philippe De Ste. Croix* and *Philippe Winter Nicolle*, resigned. The petition was met by a counter petition from certain landed proprietors, merchants, and others, praying for the suspension of the elections to the vacant posts of *Jurats* of the Royal Court. Another petition was also presented on behalf of an association designated "the Committee for the Reform of the Royal Court of *Jersey*," against the acceptance and confirmation by Her Majesty of these resignations.

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These petitions and representations were severally referred by Her Majesty to the Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey*, for their opinion and advice thereon.

The circumstances which gave rise to these proceedings were as follows:—

In the year 1864, Messrs. *Ste. Croix* and *Nicolle* had exercised the functions of *Jurats* in the Island of *Jersey* for many years. *Ste. Croix* for thirty years, and *Nicolle* for twenty-six years.

On the 14th of *January* in that year, at a meeting of the States of the Island of *Jersey*, that Assembly took into consideration a letter addressed to it by *Ste. Croix*, praying the States, on account of his long service and ill-health, to solicit from Her Majesty in Council permission to resign his office of *Jurat*; and

Court had taken place; but, although it was considered by the Lords of the Committee that a complete change in the constitution of the Royal Court was necessary, yet, as the suspension of new elections of *Jurats* would not affect any improvements in the constitution of that Court, Her Majesty was advised to permit such resignations, coupled with directions that the same privileges and distinctions that the retiring *Jurats* had enjoyed as *Jurats* should continue to them during their lives, and ordering new elections to supply the place of such vacancies.

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the States, after deliberating thereupon, acceded to the request, and passed an *Acte* for that purpose, which they directed the *Greffier* to transmit to the Privy Council.

On the 29th of *January*, 1864, the States, at their sitting of that day, took into consideration a similar application of *Nicolle*, and passed a similar *Acte*.

These *Actes* were transmitted by the *Greffier* of the States to the Privy Council in the usual manner for the sanction of her Majesty.

In the month of *February*, 1864, a petition was presented by *William Lempriere* and *John Le Couteur* on behalf of themselves and 279 landowners and others of the Island of *Jersey*, praying that at future elections of *Jurats* might be suspended, until measures should have been taken as Her Majesty should deem necessary for separating the judicial from the legislative functions of the *Jurats*, and for insuring the due administration of Justice.

The Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey* took this petition into their consideration, and on the 9th of *March*, 1864, the Lieutenant-Governor was officially informed that the Lords of that Committee would be prepared to recommend to Her Majesty that the prayer of the petition should be granted, and to advise Her Majesty to accept the resignation of the two *Jurats*, and to direct that their places should not be filled up, on receiving a distinct assurance from the States of *Jersey* that they were prepared to take the necessary measures for carrying into effect, in whole or in part, the recommendation of the Royal Commissioners with regard to the constitution of the Royal Court.

The States of *Jersey*, on the 7th of *April*, 1864,

forwarded to the Lord-President of the Council a representation, urging, amongst other things, that the suspension of the elections for new *Jurats* would be in direct violation of the constitution of the Royal Court as by law established, and that it would likewise, in effect, operate as a repeal of the law which directs that upon a vacancy occurring, a new election to the vacant office should be ordered by the Court.

In the meantime, a Bill had been introduced into the House of Commons by Mr. *Locke*, "to amend the constitution, practice, and procedure of the Court of the Island of *Jersey*," which Bill, among other provisions, provided for the substitution of a Court consisting of the Bailiff and two other salaried Judges.

On the 13th of *April*, 1864, Mr. *Waddington*, one of Her Majesty's Under-Secretaries of State, informed the Lieutenant-Governor of the island that Her Majesty's Secretary, Sir *George Grey*, had felt himself obliged to assent to the second reading of Mr. *Locke's* Bill, and that he should not have done so had he been able to hold out to the House of Commons the hope that measures would be taken by the States for the improvement of the judicial system, and the better administration of justice in *Jersey*. Mr. *Waddington* added, that Mr. *Locke* consented to postpone the next step of the Bill to a time sufficiently distant to enable the States to give an assurance of their being in earnest in dealing with this subject; and if the States availed themselves of that interval to frame and submit such a *Projet de Loi* as was described in the Lieutenant-Governor's letter, that Sir *George Grey* would willingly use his influence to induce Mr. *Locke* not to press his Bill.

Mr *Waddington's* letter was, on the 16th of *May*,

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1864, laid before the States of *Jersey*, who, on the 21st of *May*, 1864, forwarded to Sir *George Grey* a letter, wherein, among other things, they stated that they felt that they could not discuss and pronounce upon any question or measure having reference to the reform of the judicial system and administration of justice with the untrammelled liberty of opinion without which their deliberations and decisions as a representative and legislative assembly would be fallacious and worthless, so long as the constitutional question now before the House of Commons, in connection with Mr. *Locke's* Bill, and which, as the States alleged, struck at the very root of the rights of the Assembly, and of the most cherished privileges of the people of *Jersey*, that of being legislated for by their own representatives in all matters of local and internal administration, remained in suspense, and that they, therefore, respectfully postponed for the present the consideration of the correspondence submitted to the States. They stated that they were not unduly attached to the established order of things nor unmindful of, or indisposed to entertain and carry out, the wishes of Her Majesty's Government, the manifestations of public opinion, or the recommendations of the Royal Commissioners.

After the receipt of this representation Mr. *Locke's* Bill was withdrawn.

On the 4th of *August*, 1864, the States of *Jersey* passed an *Acte* making provision for the office of a *Juge d'Instruction*, necessitated by the new criminal procedure law, which was to come into operation on the 1st of *November* following, which received the Royal sanction.

On the 15th of *December*, 1864, the States of

*Jersey* met for the purpose of taking into consideration two motions, the first being for "the substitution of paid Judges for the present *Jurat* system," and the second, "for separating the judicial from the legislative functions of the *Jurats*." The States ultimately resolved, by a majority of one, that the constituencies of the Island (the ratepayers in the several twelve parishes) should be consulted upon the abstract question, whether they were of opinion, that it was desirable to substitute salaried Judges for the twelve *Jurats* of the Royal Court, and fixed the 2nd of *January* following for collecting the votes of the ratepayers in all the Parishes of the Island.

The votes of the ratepayers of the Island, in accordance with this resolution of the States, were taken on the 2nd of *January*, 1865, and the result was, that out of 2,470 ratepayers who voted, 2,290 voted against and 180 for paid Judges. At a meeting of the States on the 12th of the same month, in consequence of the result of this vote, that body at once rejected the two former motions.

On the 14th of *January*, 1865, *Edward Maurant*, and other persons associated under the designation of "The Committee for the Reform of the Royal Court," presented a representation to the Lords of the Privy Council, explanatory of the result of the voting, and alleging the illegality and unfairness of the States' resolution.

By another petition or representation from the same body, dated the 24th of *June*, 1865, addressed to the Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey*, it was prayed that Her Majesty might not be advised to accept the resignations of the two *Jurats*, and that a commission might be appointed

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to examine the state of the finances of the Island with respect to certain alleged misappropriation of the revenue.

The States, in their case in support of the *Actes* of the 14th and 29th of *January*, 1864, set forth the nature and constitution of the Royal Court, stating that it was composed of the Bailiff and twelve *Jurats*; that the Bailiff was president of the Court, and presided over the meetings of the States, that he was appointed by Patent from the Crown, being selected on account of his learning and knowledge of the laws and customs of the Island; that the qualification for the office of *Jurat* was the possession of landed property in the island to the amount of forty quarters of wheat rent (£30. 15s. 3d. per annum); that such property qualification was one fixed in ancient times, and was then deemed of sufficient amount; that the *Jurats* were chosen from among gentlemen of independent fortune and reputed ability, and who not unfrequently had shown their fitness for the office from having held other appointments in the Island.

That the twelve *Jurats* were believed to have existed long prior to the Charter of King *John*, which was only a confirmation of the privileges of the Island. That the third article of that Charter prescribed that the twelve *Jurats* should be elected from among the natives of the Island, "*per Ministros, Domini Regis Optimates Patriæ.*" That the Court thus constituted had jurisdiction over all matters whatsoever arising within the Island, with the exceptions therein mentioned; that the Charter of King *John* so granted to the Island had, from time to time, been confirmed by successive Sovereigns, as also by various laws passed by the States, which had been sanctioned by Her

Majesty in Council, and were still in force; that the mode of electing the *Jurats* had at various times been changed, sometimes according to the construction as it would seem put upon the words of the Charter, "*per Ministros Domini Regis et Optimates Patriæ*," and at others by force of legislative enactments. That by an Order in Council bearing date the 19th of *May*, 1671, it was declared, that in the elections of *Jurats* and *Connétables* none be admitted to vote except those who contribute to public taxes and to the provisions made for the poor, and are masters of families; and in the Code of 1771 (pp. 168-9) the terms of the last mentioned Order in Council were repeated; that at present the right to vote at elections was regulated by an Act of the States, dated the 14th of *January*, 1833, confirmed by Her Majesty in Council on the 15th of *July*, 1835, and was vested in all persons not under disability, who may be rated in respect of property either real or personal, as to real property of the value of £50, and as to personalty, to the amount of £114, capital; that the *Jurats* received no salary for the performance of their duties, and the Court fees to which they were entitled were so small, that their services were, in fact, virtually gratuitous.

That the *Jurats*, besides being members of the Royal Court, were also members of the States or Legislative Assembly of the Island, which was composed of fifty members, namely: the twelve *Jurats*, twelve Rectors of the twelve parishes into which the Island is divided, and the twelve *Connétables* or Mayors, and fourteen Deputies. That the *Jurats* were elected for life by the whole of the ratepayers throughout the Island. The Rectors were appointed for life by the Crown; that the *Connétables* and Deputies were elected by the rate-

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payers of the parishes which they respectively represent the *Connétables* irregularly every three years, as the tenure of office expired, or as a vacancy occurred, the Deputies triennially in the month of *January*, or whenever a vacancy occurred; and it was submitted by the States that the prayer of the petition of the landowners beseeching Her Majesty to direct that all future elections for the post of *Jurat* be suspended until such measures should have been taken as Her Majesty might deem necessary for separating the judicial from the legislative functions, ought not to be granted or seriously entertained, as the simple issue was, whether having regard to the inability of the two *Jurats* any longer to perform the duties of their office, the *Actes* of the States of the 14th and 29th of *January*, 1864, ought not to be confirmed by Her Majesty in Council and new elections directed. That it could not be disputed that the States had authority to originate laws that they may think requisite for the due administration of justice or otherwise within the Island, and that by their *Actes* of the 14th and 29th of *January* 1864, accepting the resignation of the two *Jurats*, they had not exceeded their powers. That the only legitimate question, therefore, was whether, looking at the constitution of the Royal Court as by law established, the Crown ought, in justice or on the ground of expediency, to withhold the Royal assent to the two *Actes* referred to. That in practice two different methods had been adopted where *Jurats* have desired to resign their office. In some instances the *Jurats* wishing to retire had made their applications by petition addressed immediately to Her Majesty in Council, and in others to the States. In cases, however, where petitions had been directed immediately to Her Majesty

in Council, it had been usual, before granting an order to refer the application to the States, and the Orders in Council dated respectively 6th of *March*, 1837, 21st of *October*, 1839, and 3rd of *April*, 1840, confirmed this statement.

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It was further urged that the Royal Court, according to the Charter of King *John*, is to consist of twelve *Jurats*, as expressed in the Charter "*Imprimis constituit duodecim Coronatores Juratos ad placita et Jura ad coronam spectantia custodienda*;" that in Article iii. of the Charter it is provided "*Ji debent elegi de Indigenis Insularum per Ministros Domini Regis et Optimates Patriæ, scilicet post Mortem unius eorum, alter fide dignus, vel alio casu legitimo, debet substitui.*"

That the right of the people to elect the *Jurats* was indisputable, and an Order in Council of the 15th of *July*, 1813, clearly established who were entitled to vote in the elections, no law affecting a change in this respect having ever been made, whilst on the contrary, as well by the various Charters since that of King *John* as by the laws and customs of the Island, the same number of *Jurats* had always been maintained; that it was true that in troublesome times the places of the *Jurats* had not immediately, on a vacancy occurring, been filled up, as during the civil war and on the return of King *Charles* the Second to the throne; but, as would be seen by their Letters patent, both *Oliver Cromwell* and *Charles* the Second carefully desired to maintain the constitution of the Island with regard to the number of *Jurats*; and referring again to the Charter of King *John*, which provides for supplying the place of a *Jurat* dying or a vacancy occurring from some other legitimate cause, it was submitted that ill health had always been considered

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as a legitimate cause for a *Jurat* to ask to resign his office, and it was upon similar grounds that Messrs. *Ste. Croix* and *Nicolle* sought to resign; that the reasons given by them upon which their applications were grounded were not contested, and it would be harsh towards them if they were, under the circumstances, and against their will, to have to continue in office.

The States by their case further maintained; that they conceived that the question of the alteration of the constitution of the Island, urged by the opposing petition, was not then before the Committee, and proceeded to show how the proposed alteration had been viewed by the people of *Jersey*, stating the Royal Commissions of 1846 and 1859 to inquire into the state of the Criminal, Civil, Municipal and Ecclesiastical Laws of the Island, and submitted that the allegation in the report of the Commissioners appointed in 1846 that the Royal Court neither possessed nor deserved the confidence of the people, was not founded on fact, for that very soon after that report had been published large public meetings of the inhabitants were held, and resolutions passed, entirely repudiating the conclusion at which the Commissioners had arrived, and solemnly protesting against any change by which the people should be deprived of the power of electing their own Judges; they also stated that on the 13th of *December*, 1860, after the report of the Commissioners appointed in 1859, a proposition, or rather a series of resolutions, was lodged *au Greffe*, relative to the course to be pursued for the consideration of the recommendations of the Commissioners, but considering that one of such recommendations involved the complete annihilation of the Royal Court, and

the effecting of other fundamental changes in the constitution of the Island, the States on that day abstained from proceeding further in the matter, in order to afford the *Connétables* an opportunity to consult their constituents according to law upon the changes proposed ; that, in the year 1861, the *Connétables* convened public meetings of their constituents, and the result was a unanimous decision of the twelve parishes, directing the *Connétables* to oppose the change in the constitution of the Island recommended by the Commissioners ; that, on the renewal of the discussion by the States, that Assembly, on the 25th of *May*, 1861, unanimously resolved to reject the recommendations for altering the constitution of the Royal Court, but being of opinion that many of the other recommendations of the commissioners for improving the laws of the Island might usefully be adopted, the States subsequently passed various *Actes*, embracing those recommendations and other subjects, and making considerable changes in their laws.

That on the 25th of *May*, 1864, the States renewed the discussion of the Commissioner's report of 1859, when it was unanimously resolved to reject the recommendation for altering the constitution of the Royal Court, but the States proceeded to pass *Actes*, carrying out some of the recommendations of the Commissioners ; that, notwithstanding the unanimity expressed by the electors when consulted by the constables in pursuance of the *Acte* of the States of the 13th of *December*, 1860, the States (in consequence of a representation which appeared to have been made to Her Majesty's principal Secretary of State for the Home Department, to the effect that the views of the people had undergone a change with regard to the

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alterations proposed in the constitution of the Royal Court), with the object of still more clearly and decidedly ascertaining the wishes of the electors, by an *Acte* of their assembly of the 15th of *December*, 1864, determined again to consult the constituents on this important question, and accordingly ordered the constables to collect the opinions of the ratepayers in each Parish in the same manner as in public elections. upon the question, whether they were of opinion to constitute paid Judges instead of the twelve *Jurats* of the Royal Court, and on the 2nd of *January*, 1865 the opinions of the electors were collected, and the following was the result:—Actually resident, 3989, against paid Judges, 2298; for paid Judges, 1810. That, on the 12th of *January*, 1865, the States met to receive the returns of the constables when that assembly adopted the *Acte*, thereby directing the Committee to whom the subject had been referred, to press the acceptance by Her Majesty in Council of the resignation of Messrs. *Ste. Croix* and *Nicolle*, and the States submitted, that the above statements demonstrated clearly that, so far from having a want of confidence in the Royal Court, the people of *Jersey*, as a body, had the strongest objection to the subversion of that Tribunal.

That, with regard to the alleged delays in the administration of justice, the States deeply regretted that any delays should exist, but they asserted that it was far more attributable to the suitors themselves than to the Court; and they submitted that great inconvenience had been felt from the non-appointment of the two *Jurats*, as by the continued suspension of the election of *Jurats*, in the room of Messrs. *Ste. Croix* and *Nicolle*, the course of justice was impeded,

and the States rendered incomplete; and the States finally submitted, that the course of proceeding proposed, to accept the resignation of the two *Jurats*, but to direct that their posts should not be filled up, would be a violation of the constitution of the Royal Court, and would indirectly operate as a repeal of the law of the Island, which directs that, upon a vacancy occurring in the office of *Jurats*, a new election shall be ordered by the Court, and prayed that their *Actes* of the 14th and 29th of *January*, 1864, might be confirmed by Her Majesty, and that the resignations of the *Jurats*, *Ste. Croix* and *Nicolle*, might be accepted, and an election of *Jurats* in their place directed.

The case on behalf of the Petitioners, the Merchants and landed proprietors, set forth that serious dissatisfaction with the present constitution of the Royal Court had for years existed, and had lately been increasing in the minds of the inhabitants of the Island, the causes of which were fully stated in the Reports of the Commissioners appointed in 1846, and in 1859, which unhesitatingly condemned the present constitution and character of the Royal Court, and recommended the creation of a new Tribunal, to be composed of three paid Judges. And with respect to the representation made by the States, that if Her Majesty should be pleased to accept the resignations of the two *Jurats*, but to direct that their places should not be filled; such a course of proceeding would be in direct violation of the constitution of the Royal Court as by law established, and that it would likewise in effect operate as a repeal of the law which, as contended by the States, directs that, upon a vacancy occurring, a new election to the vacant office should

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be ordered by the Crown; the Petitioners submitted and insisted, first, that the present constitution of the Court in no wise differed from its constitution in the year 1734; secondly, that when, upon cause shown, His then Majesty in Council was pleased to remove and discharge from their office five of the *Jurats* of the Royal Court, without ordering any fresh elections in their places, as appeared by a letter dated 11th of *April*, 1734, from the Lords of the Privy Council to the Bailiff and *Jurats* of the Royal Court, directing them not to proceed to any election of *Jurats* to replace the five who had thus been removed, until His Majesty's pleasure was made known, which was afterwards expressed by an Order in Council of the 9th of *July*, 1735, for the election of "three new *Jurats* only for the present;" which continued until an Order in Council of the 27th of *December*, 1739, directed the Royal Court to proceed to the election of six new *Jurats*, being the number of the then existing vacancies, and further directing that, as other vacancies should happen, the Court should proceed to the election of new *Jurats* to supply their places; thirdly, the Petitioners submitted that, even if it were the fact that on the death of a *Jurat* the custom has been for the Court to order a new election, yet it did not follow that there was any law which prescriptively directed that upon a vacancy occurring in the office of *Jurat* except by death, a new election should be forthwith ordered by the Court, there being as the Petitioners insisted, nothing in the Order in Council of 1739 which was intended to have or had any force or effect to restrain Her Majesty in Council from suspending at any time the election of new *Jurats*, should she see just cause for so doing. Fourthly, that by the two *Acts*

of the States sought to be confirmed, Her Majesty in Council was prayed not only to permit the resignations of the two *Jurats*, but also to appoint fresh elections; whereas the Petitioners submitted that no Order for fresh elections could be required if, as assumed by the States, a general law already existed providing in such cases for fresh elections to be ordered by the Royal Court itself.

That if it was contended, that it was not competent for the Crown, except on motion of the States, to accept the resignations in question, and at the same time to direct that, until further Order, no election should take place to supply the vacancies thereby caused; the Petitioners' answer was, that on several occasions the prerogative of the Sovereign in Council to legislate for the Island, *motu proprio*, had been recognized and acted upon; and the Petitioners submitted, that no limitation or restriction of Her Majesty's prerogative of legislation has since taken place, and, in particular, they denied that any such limitation was intended or affected by the Order in Council of the 28th of *March*, 1771, whereby His then Majesty was pleased to give effect to certain Ordinances, since called "The *Code* of 1771," the scope of which Order, as the Petitioners believed, was merely to take away from the Royal Court a power of making Ordinances, previously assumed by that body, independently of the States. They admitted, however, that this power of legislation, *ex motu proprio*, might be subject to some limitation, as, for instance, where taxation of the inhabitants of the Island is involved; but that no such ground of limitation existed in the present case. That should it appear to the Lords of the Committee that a fresh election must necessarily

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follow the acceptance of the resignation of a *Jurat* the Petitioners would contend that the acceptance of such resignation was matter of grace and not of right and would not merely deny that by such non-acceptance any wrong would be inflicted, as alleged by the States of *Jersey*, but would also urge that no inconvenience to the public service which might possibly therefrom arise could be tantamount to the injury which would be inflicted on the Petitioners and a litigants in *Jersey* if by the acceptance of the resignations, and by the consequent occurrence of fresh elections, the delay of the reconstitution of the Royal Court of *Jersey* were further and indefinitely postponed; and they expressed their belief that if, under existing circumstances, the Royal Court should be ordered to proceed to new elections of *Jurats*, such Order would be taken as evidence of the approval by Her Majesty in Council, not only of the continuance of the present judicial system, but also of the conduct of the States of *Jersey* in relation to the present matter. They insisted that the whole course adopted by the States with regard to the repeated representations of Her Majesty's Government, showed a determination to refuse, as long as possible, the origination of any measure calculated to remove the objections which are justly entertained against the continuance of the present judicial system. That the measures which the States had adopted as regarded criminal and civil procedure, might or might not be good in themselves but in the words of the Commissioners of 1859, "the Island has so completely outgrown its judicature, that any reforms which shall leave the duties of the Superior Court in the hands of a numerous body without pro-

fessional education, whose attendance is precarious, and for whose nomination no one is responsible to public opinion, will be absolutely nugatory."

With regard to the allegations contained in the representation of the Petitioners, the *Jersey* Reform Committee, as to the misappropriation of the revenues of the Island, and in particular of the harbour dues, the Petitioners stated that they did not then seek to urge the request contained in their representation for the appointment of a Commissioner to examine the state of the finances of the Island, nor to enter minutely into any complaints on the general mal-administration of the revenues, although believing that, on a proper occasion, they could show that great defects existed in their administration, owing very much to the circumstance that under the present constitution of the Royal Court, no independant tribunal existed in the Island which could be applied to successfully with the object of remedying such defects; that besides being members, with the Governor and Bailiff of the Assembly which controls the *Impôt* (the chief source of the Island revenues), the *Jurats*, as members of the States, and, indeed, most frequently as members of particular standing Committees of that body, to whom the details of administration of the finances are entrusted, had a very direct share in decisions which in their judicial capacity they might afterwards be called upon to review; nor did the Petitioners at present bring forward this part of the subject of their representation, except in illustration of the evils of the present system, being desirous rather of urging the former part of their petition, namely, that relating to the non-acceptance of the resignations of the two *Jurats*; and it was prayed that the confirmation

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of the *Actes* of the States of the 14th and 29th of January, 1864, and the acceptance of the resignations of *Philipe de Ste. Croix* and *Philipe Wintre Nicolle*, Esquires, might not be recommended to Her Majesty in Council; or, if Her Majesty should be advised to accept such resignations, then that the confirmation of so much of the said two *Actes* of the States as related to the ordering of fresh elections in the room of the two resigning *Jurats* should not be recommended, but that it be recommended that during Her Majesty's pleasure no such elections to the two vacant places should take place.

No case was lodged by the *Jersey Reform Committee*.

Mr. *Rolt*, Q.C., Mr. *Bovill*, Q.C., and Mr. *W. H. Mackeson*, for the States of *Jersey* :—

According to the Law and constitution of the Island, there must be the full number of twelve *Jurats*. The office is for life, but where there are sufficient reasons, as in the present instance, for *Jurats* tendering their resignations, it is expedient that such resignations should be accepted by the Crown. In the case of death of a *Jurat*, it is not in dispute that the Royal Court, consisting of the Bailiff and *Jurats*, can issue their warrant to fill up the vacancy, *Falle*, p. 146 [Ed. by *Durell*, 1837], without any sanction of the Crown. [LORD CHELMSFORD.—If the Queen accepts the resignation of a *Jurat*, can the States proceed to a new election immediately?] Yes; the acceptance of such resignation involves a new election, but, we do not dispute the power of the Crown to accept or refuse such resignation; that is within the Charter of

King *John*, but we contend on behalf of the States, that the resignation cannot be completed without the consent of both the legislative bodies, the Crown and the States. The Crown cannot legislate so as to affect internally the affairs of the inhabitants of the Island, except with the consent of the States, *In re the States of Jersey* (a). This doctrine was confirmed with respect to the Island of *Guernsey*, *In re the States of Guernsey* (b), where it was held, that an ancient office, the *Contrôle de la Reine*, could only be abolished by an Order in Council, with the consent of the States of that Island.

The Islands of *Jersey* and *Guernsey* are said by Lord *Coke* in *Calvin's Case* (c), to be no parcel of the realm of *England*, 4 Inst., p. 286, and that they are governed by their own laws. As to the rights of the Islanders to the benefit of the Charter of King *John*, that Charter must be taken not as the foundation, but the confirmation of rights which previously existed. The original Charter is lost, but the substance of it is to be found in an inquest taken in the reign of his son, *Hen. III.*, *Falle* 222, after *Normandy* was alienated. This inquest recites and confirms the Charter. By the first clause twelve *Jurats* are appointed, whose offices are now in question. "I. *Constituit Duodecim Coronatores Juratos, ad placita et Jura ad Coronam spectantia custodienda.*" Their further duties are then defined in the second clause: "*Constituit etiam et concessit pro securitate Insularum, quod Ballivus de cetero per visum dictorum Coronatorum poterit placitare absque Brevis de Nova Dissëisinâ factâ infrâ annum, de Morte Antecessoris infrâ annum, de Dote similiter infrâ annum, de Feodo*

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(a) 9 Moore's P. C. Cases, 185. (b) 14 Moore's P. C. Cases, 368.

(c) 7 Co. Rep. 21 a.

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*invadiato semper, et Incumbreio Maritagii," &c.* The third clause is most essential: "*ji debent eligi de Indigenis Insularum, per Ministros Domini Regis et Optimates Patriæ; scilicet post mortem unius eorum, alter fide dignus, vel alio casu legitimo, debet substitui.*" Now, the words "*debet substitui*" in the Charter, like our Great Charter, are a positive enactment, providing in the event of death, "*vel alio casu legitimo,*" one shall be substituted. The Crown cannot at its pleasure suspend the operation of the Charter. It may inquire into the cause of the resignation. Here a sufficient cause has been shown. Age and infirmity are a legitimate cause. The Charter of *John* is confirmed by the Charter of *Edw. III.* in the largest terms. The Crown confirms to the Island "*Omnia privilegia, libertates, immunitates, exceptiones et consuetudines in personis, rebus, monetis, et aliis.*" *Falle*, pp. 91, 357. So the Charter of *Eliz.* ratifies and confirms all and singular the constitutions of the Island respecting the Bailiff and *Jurats*. Again, by an *Acte* of the Royal Court of *Jersey*, in 1564, one *Dumaresq* was appointed on a death to fill up the number of *Jurats*. Then the Order in Council of *Car. II.*, 9th May 1671, recognizes the right of Election of *Jurats*. In the year 1734, there were proceedings by the Crown to remove some *Jurats* for corruption and misconduct, but the other *Jurats* declined to act, and in 1739, an Order in Council was made for the election of new *Jurats*. By the *Code* of 1771 the laws and privileges of the Island are confirmed. [LORD CHELMSFORD:—That *Code* appears to be an Order in Council registered by the States.] The States agreed to the *Code*. That may raise a question now before this Tribunal, as to the powers of the Parliament to legislate for the Island of *Jersey*.

[LORD CHELMSFORD :—Not so. It is with respect to the power of the Queen in Council to make laws for *Jersey*.] That very question arose: the case of *The States of Jersey (a)*; there the Court refused to register the orders in Council. It is true that by an Order in Council of the 8th of *November*, 1811, it is directed that all elections of *Jurats* should be suspended until certain Commissioners who were about to proceed there should examine the laws relating thereto. Then there is the Order in Council of *July*, 1813, directing all future elections of *Jurats* to be according to the Order in Council of the 10th of *May*, 1671. The history of these Orders in Council fully appears in *Le Quesne's Const. Hist. of Jersey*, p. 447. [LORD CHELMSFORD :—Is not the whole question this—whether it is expedient that the Crown should prevent a new election of *Jurats*?] It would be inexpedient and prejudicial to justice and the laws of the Island to accept the resignations without at the same time filling up the vacancies. In the case of ordinary Corporations in *England*, where there is a body, it is the right of the electors, and of every other person, that the number should be full, and the Court of Queen's Bench will grant a Mandamus to compel the Corporation to fill up an office so vacant.

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The Solicitor-General (Sir *R. Collier*), Mr. *C. S. Perceval* with him, for the Petitioners :—

There can be no doubt of the power of the Crown to legislate by Order in Council for the Island, Rep. of *Jersey Coms.*, 1859, p. v., and that the constitution of the Royal Court can be altered by an

(a) 9 Moore's P. C. Cases, 185.

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Order in Council. *Falle*, p. 157, a high authority, expressly states so. The Rep. of the *Jersey Com.* 1846, p. v., also says that by the Norman law the Duke of *Normandy* had supreme legislative power and that the form that this authority now assumes is that of Orders of Her Majesty in Council, and that this has been the course for centuries. The case of *The States of Jersey (a)*, as the report of their Lordships show, does not determine that Her Majesty could not, consistently with the constitutional rights of the Island, legislate by Orders in Council, but only that in that particular instance it was expedient to revoke the particular Orders complained of.

First, then, with respect to the *Jurats*. The Statute relies upon the Charter of King *John*, but *Le Quesne* in his Constitutional History of *Jersey*, p. 63, doubts whether there ever was such a Charter. It is not described as a Charter in the inquest of his son, *Hen. III.*: *Le Quesne*, p. 60. [LORD CHELMSFORD:—How long did the Kings of *England* retain the title of Duke of *Normandy*?] King *John* gave it up. [LORD CHELMSFORD:—There is a confirmation of the fact of there being a Charter of King *John* in the Charter of *Elizabeth*, which speaks of privileges &c., granted by former Kings of *England* and Dukes of *Normandy*.] It was not a Charter under the Great Seal, but a mere Ordinance, and had not the effect of conferring any legislative power. All it did was to give the Coroner a standing jury of twelve to determine certain cases. It did not confer the power the States contend the *Jurats* have. There can, however, be no question that Her Majesty, even if

(a) 9 Moore's P. C. Cases, 262.

the resignations are accepted, may withhold the sanction for filling the vacancies, and that during pleasure. [The LORD CHANCELLOR:—Your argument is, that the Crown has undoubted legislative authority in all matters, and, therefore, must have with respect to the *Jurats*.] Yes. We contend that your Lordships ought to recommend that no election shall take place during Her Majesty's pleasure.

[The LORD CHANCELLOR:—We think that question is properly before us, but that is not necessarily involved by the question of general legislation throughout the Island. If it were to be shown that Her Majesty had an absolute power of legislating in the Island in the same way as the Queen, Lords and Commons can legislate in *England*, it would be idle to argue whether she could make a particular disposition with respect to *Jurats*, because Her Majesty can then do anything. But the question before us is not, whether there is a general power of legislating on all subjects whatever, and uncontrolled on the part of Her Majesty in Council, but whether there was a power in Her Majesty in Council to interfere in this particular instance of regulating the election of *Jurats*. Your argument must be confined to the expediency of the Crown exercising the undoubted power of accepting or refusing these resignations, and so impliedly sanctioning the elections, if accepted, of new *Jurats*.]

Supposing the Crown should think fit to accept the resignation, still there is the power to direct that no elections should take place to fill the vacancies. [The LORD CHANCELLOR:—The question really is the expediency of exercising that power.] Serious dissatisfaction with the present constitution of the Royal

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Her Majesty having been pleased, by Her General Order to refer unto this Committee the several Acts of the States of the Island of Jersey, and other documents hereinafter described, relative to the retirement of *M. Philipe de Ste. Croix* and *M. Philipe Winter Nicolle*, two of the *Jurats* of the Royal Court of the said Island, viz.:—Act of States, 14th of *January*, 1864; Act of States, 29th of *January*, 1864; Petition of the Landed Proprietors, Merchants, &c., of the Island; Act of States, 12th of *January*, 1865; Petition of the States of the Island, 14th of *January*, 1865; Representation of the States, 7th of *April*, 1864; Petition of Committee for Reform in *Jersey*, 1st of *October*, 1864; Representation of Committee of Reform, 24th of *June*, 1865. The Lords of the Committee, in obedience to your Majesty's said Order of Reference, have this day (18th of *January*, 1866) taken into consideration the said Acts and the said Representations and Petitions, and having heard Counsel on behalf of the States, and of the Petitioners against the confirmation of the Acts of the States of the 14th and 29th *January*, 1864, their Lordships do agree humbly to report as their opinion to your Majesty that, although they are strongly of opinion that a complete change in the constitution of the Royal Court is absolutely necessary for the welfare of the Island, yet, as neither the refusal by your Majesty, in exercise of your undoubted right to accept the resignation, nor the suspension of any new election of *Jurats* to supply the place of those resigning, would have an immediate effect in improving the present constitution of the Court, and as your Majesty would certainly desire that, until the constitution of the Court has been effectually improved by legislative interference, no course should be taken which might have a tendency to render it less efficient than it now

s, their Lordships, therefore, humbly advise that your Majesty may be graciously pleased to permit the said *Philippe de Ste. Croix*, Esq., and the said *Philippe Winter Nicolle*, Esq., to resign their offices of *Jurats*, and to allow them to continue during their lives all those privileges and distinctions which *Jurats* do now, or may hereafter, enjoy, as far as your Majesty may be enabled in law. And the Lords of the Committee are further of opinion, that your Majesty should authorize that new elections of *Jurats* should be made according to the laws and constitution of the Island of *Jersey* to supply the said vacancies.

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The Order in Council made thereon, dated the 3rd of *February*, 1866, after setting forth the Committee's Report, proceeded in these terms:—"Her Majesty having taken the said Report into consideration, was pleased by and with the advice of Her Privy Council, to approve of what is therein proposed, and doth accordingly permit and allow the said *Philippe de Ste. Croix* and *Philippe Winter Nicolle* to resign their said offices of *Jurats* of the Royal Court of the Island of *Jersey*, and doth also allow them the continuance, during their lives, of all those privileges and distinctions which *Jurats* do now, or may hereafter, enjoy, so far as Her Majesty doth hereby order; that new elections be made of *Jurats* according to the laws and constitution of the said Island of *Jersey*, to supply the said vacancies; and Her Majesty doth further order, and it is hereby ordered, that the said Acts (copies of which are hereunto annexed), together with this Order, be entered upon the Registry of the Island of *Jersey*, and observed accordingly. Whereof the Lieutenant-Governor or Commander-in-Chief, the

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Bailiff and *Jurats*, and all others Her Majesty's officer for the time being in the said Island, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

### ON APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE.

BARTOLOMEO CASANOVA and others - *Appellants*;

AND

The QUEEN and JOHN SHAW - - *Respondents*;

The "*Ricardo Schmidt*."

12th Feb.  
 1866.  
 — — —  
 Sec. 23 of  
 the 26th &  
 27th *Vict.* c. 24,  
 which limits  
 the time for  
 appealing  
 from the Vice-  
 Admiralty  
 Courts abroad  
 to six months,  
 vests, by the  
 same section,  
 a discretion  
 in the Judi-  
 cial Commit-  
 tee to admit  
 an appeal  
 notwithstand-  
 ing six months  
 have elapsed.

BY the Vice-Admiralty Court Act, 26th & 27th *Vict.*, c. 24, s. 23, it is enacted that "the time for appealing from any decree or order of a Vice-Admiralty Court shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from, and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the Registry of the High Court of Admiralty and of appeals within that time, unless Her Majesty is

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, Sir James William Colvile, and Sir Edward Vaughan Williams.

Circumstances showing that there was no wilful laches in not lodging a petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question, held, sufficient for the exercise of the discretion vested in the Judicial Committee, to admit an appeal under that section, upon payment of the costs of the application, and giving security for further costs.

Council shall, on the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding the petition of appeal has not been lodged within the time prescribed."

The ship "*Ricardo Schmidt*," with a cargo of ground nuts and palm oil, under the command of the Appellant, was seized in the harbour of *Freetown, Sierra Leone*, under the Statute, 5th Geo. IV. c. 113, as being equipped for and engaged in the Slave trade, and taken to the Vice-Admiralty Court at *Sierra Leone* for adjudication. By a decree, dated the 26th of *September*, 1864, that Court held that it was not proved that the "*Ricardo Schmidt*" was equipped for the Slave trade, and ordered the suit to be dismissed, but without costs or damages, as the Court considered there was probable cause for the seizure, as the owners of the vessel had not entered into a bond at *Genoa* for certain water casks on board, according to the provisions of the Treaty between *England* and *Sardinia*, and dismissed the case, without damages or costs. On the 4th of *October*, 1864, an appeal was asserted by the Claimant for damages and costs.

The owners of the "*Ricardo Schmidt*" resided at *Genoa*, and, after being informed of the result, they instructed Proctors in *London* respecting the advisability of appealing, but as at that time an appeal in the case of the ship "*Laura*" (a) was depending before the Judicial Committee, in which, as it was alleged, a similar claim for costs, losses, and damages was made, they were advised by Counsel to await the decision of their Lordships.

On the 14th of *September*, 1865, the Petitioners

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(a) *Ante*, p. 181.

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lodged a petition of appeal praying to be allowed to appeal from the decree of the 14th of *September*, 1864. As the petition of appeal was not lodged in the Registry of the appeal Court within six months from the date of the decree, the time prescribed by the 26th and 27th *Vict.*, c. 24, s. 23, it was now moved by the Appellants under that section, that the Judicial Committee would be pleased to report to Her Majesty, that the Appellants might be allowed to prosecute their appeal, and that the proceedings already taken for prosecuting the appeal, whereby the process had been forwarded from *Sierra Leone*, might be ratified. This motion was supported by an affidavit of the Petitioner's Proctor, setting forth the above facts. The motion was opposed by the Crown.

Mr. *V. Lushington*, and Mr. *Bayford*, in support of the motion.

The delay in lodging the petition of appeal arose from the Petitioners waiting for the decision of this Tribunal in the case of the "*Laura*," similarly circumstanced. The time limited by the Statute, 26th & 27th *Vict.*, c. 24, s. 23, which is six months for prosecuting appeals from Vice-Admiralty Courts abroad, including *Sierra Leone*, was overlooked, but the usual steps for prosecuting the appeal have been taken within twelve months, the period prescribed by the 5th *Geo. IV.*, c. 113, the Slave Trade Abolition Act, under which the proceedings against the "*Ricardo Schmidt*" were had, and which time is still allowed for prosecuting appeals from the High Court of Admiralty of *England*, as well as from some of the Vice-Admiralty Courts abroad. Upon the merits we are entitled to indulgence; the owners are Foreigners, and the strict practice was not known at *Sierra Leone*.

The fact of the Court releasing the vessel without awarding costs and damages involves an important question of law. We have sustained damages between £3,000 and £4,000.

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The Queen's Advocate (Sir R. Phillimore, Q.C.)  
and Dr. Swabey, for the Respondents, *contra*.

No doubt there is a discretion vested in the Judicial Committee by the 23rd section of the Statute, 26th & 27th *Vict.*, c. 24, to recommend the allowance of an appeal, otherwise shut out, for non-compliance with that section, which requires the petition of appeal to be lodged in the Registry within six months from the date of the decree, but we submit that the section must be construed to mean "adequate" grounds. Here there does not appear to be any particular question of law raised to justify the indulgence asked for. The only ground accounting for the delay is the waiting till the decision of this Court in the "*Laura*;" that alone, we submit, is not sufficient.

The LORD JUSTICE KNIGHT BRUCE:—

No ground really exists to entitle the Petitioners to the exercise of the discretion vested in their Lordships by the Statute, 26th & 27th *Vict.*, c. 24, s. 23, to admit the appeal, notwithstanding six months have elapsed, except that the Petitioners, whom we believe intended to appeal, did not lodge their petition of appeal in the Registry until a similar case, the "*Laura*," which was then before their Lordships, had been decided. As, however, there was a *bonâ fide* intention to appeal, their Lordships think, in the circumstances, that the appeal ought to be admitted and prosecuted upon payment of costs of the present

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application, and giving security for costs to the amount of £300. The proceedings that have already been taken for prosecuting the appeal will be ratified.

### TROTMAN'S PATENT.\*

21st & 28th  
 Feb. 1866.

To entitle a Patentee to a prolongation of the term of Letters Patent, he must satisfactorily establish the amount of his profits.

A Patentee did not manufacture or sell the patented article (ship anchors), but granted licenses to Ironsmith, to manufacture, from whom he received royalties. On an application by him for an extension of the term of the Letters

THIS was a petition by the Patentee, *Trotman*, for a prolongation of the term of Letters Patent, granted to him in *April*, 1852, for his invention of "Improvements in Anchors."

It appeared from the petition, that Letters Patent had been granted to one *Porter* in *August*, 1838, for improvements in anchors, but which Patent had been worked by his Assignee, *Honiball*. That the Petitioner's invention and improvements which were applicable to *Porter's* anchors consisted, "first, in forming or fixing the palm intermediately of the breadth of the arm; secondly, in forming the breadth wider than the arm; and, thirdly, in forming or attaching the palm of *Porter's* at the back of the arm," as it was alleged, that by these improvements an anchor made in accordance with the Petitioner's invention

\* Present: Lord Chelmsford, Sir James William Colville, Sir Edward Vaughan Williams.

Patent on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the Patent being unsatisfactory, and no accounts given of the profits derived by the Licensees, a prolongation of the Letters Patent was refused, first, as the Patentee's accounts were unsatisfactory, and secondly, from the Patentee having so dealt with his patent rights as to deprive him of the power of showing the amount of profit derived from the working of the patent.

Licensees stand, with respect to the profits, in the same position as an Assignee of the Patentee.

was ensured to bite the ground immediately, without a possibility of the unopened fluke dragging along, as was the case sometimes with *Porter's* anchor, when the fluke did not open out by the action of the horn, and that in the improved anchor the cable was less likely to foul the horn in consequence of its peculiar formation, and by reason of the angles which the faces of the palm made to the faces of the arms, much greater holding power was obtained than in *Porter's* or any other existing anchor, for which invention Letters Patent had been granted to the Petitioner for *England* on the 20th of *April*, 1852, and for *Scotland* and *Ireland* on subsequent dates. That shortly afterward the grant of the Letters Patent, trials were made under the Admiralty superintendence, of the relative value of anchors, and the result of the trials proved the Petitioner's anchor to possess superior advantages over the other anchors tested : but that, although extensively employed by the Merchant Marine, yet, with the exception of Her Majesty's Royal Yacht, "*The Victoria* and *Albert*," the anchor was not employed by the Royal Navy, notwithstanding it had been recommended by a Committee of the House of Commons sitting upon that subject.

The Petitioner further stated, that from the outset of his endeavours to bring his anchor before the public he had met with great difficulties, both from the peculiar nature of the trade of an Anchorsmith, and other causes, and that the paucity of skilled labour among that trade had limited the production of his anchors, although the number of licences he had granted to Anchorsmiths, at a certain royalty, had steadily increased. That not being a maker or dealer in anchors, he had derived no benefit from the

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manufacture or sale thereof, and no advantage, except in the way of royalties, and having no trade or goods in any trade for the manufacture of anchors, he could not receive any remuneration from his invention after the expiration of the Letters Patent. That he had expended large sums of money in connection with his improvements, and in superintending the manufacture of the anchor by his Licensees, and in endeavouring to make his invention known, appreciated and used by the public; and that the royalties received and to be received from the Licensees, would not afford a remuneration or reward adequate to the great labours which he had sustained, or commensurate with the benefits which the invention had conferred on the public, and he prayed for an extension of the English Patent for fourteen years.

There was no caveat entered or opposition.

Evidence was given showing that the Patent was most useful one, and extensively employed in the Merchant Marine, though not adopted in the Royal Navy. From the accounts produced by him it appeared that the Licensees had paid the Petitioner for royalties the sum of £15,000. Among the items of the expenditure of the Petitioner in reference to the profits of the Patent, he deducted the sum of £4,900 for his personal allowance and subsistence money, for visiting and overlooking the Licensees' works while manufacturing the anchors during the fourteen years of the Patent.

Mr. Webster, Q.C., and Mr. Henry James, for the Petitioner :—

This case materially differs from other applications for extension of the term of Letters Patent. Here

the Inventor is not the Manufacturer of the patent article, nor did he sell the same. He has granted licenses to Ironsmiths to manufacture his anchors on their own account upon a given royalty, and the royalties received by him have not remunerated him for what is confessedly a most useful Patent. [LORD CHELMSFORD:—As the Patentee has adopted that mode of working the Patent, if not sufficiently remunerated, is he not bound by the consequence? The accounts are most unsatisfactory. The charge of £500 a year for personally superintending the Licensees' manufactures is unheard of. There ought to have been a return of the profits of the Licensees, who are in the same position as an Assignee of the Patentee.] From the nature of the case, that is impossible. It is similar to a Patent for making bread, where licenses have been granted to Bakers. How could you ascertain the Bakers' profits? There is no means of ascertaining the Licensees' profits or loss in this instance. In *Perkins' Pat. (a)*, a similar charge for personal superintendence of the Patent was allowed.

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Mr. *Hannen*, for the Crown.

Such an application as the present is not a matter of course. The Patentee must, in addition to the public utility of the invention, show, first, that he has not been adequately remunerated, and, secondly, that he has pushed on the Patent so as to obtain that object, which in this case he has not done, as he only granted licenses to manufacturers. The accounts are unsatisfactory. Among the items the deduction he makes from the profits for personal expenses for

(a) 2 Webs. Pat. Cases, 17.

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visiting and superintending the Licensees' establishments, amounting to £4,900, cannot be allowed. Again, no accounts have been filed by the Licensees, who are in the same position as Assignees of the Patentee. It is impossible to ascertain from the accounts filed by the Petitioner what have been the profits of the Patent.

7th March,  
 1866.

The consideration of the application was reserved. Their Lordships' judgment was now delivered by  
 LORD CHELMSFORD :—

This is an application for the extension of the term of a Patent for "Improvements of Anchors."

The Patent in question was taken out by the Petitioner shortly before the expiration of a Patent which had been granted to a Mr. *Porter* for "Improvements in Anchors," and which Patent had been worked by *Porter's* Assignee, Mr. *Honiball*, the uncle of the Petitioner, who assisted him in the business. It was to this anchor of *Porter's* that the Petitioner's improvements were applied. *Porter's* anchor had considerably improved upon the anchor in common use, but upon a trial for infringement of his Patent it was found that the principle of his improvements had been anticipated by a person of the name of *Logan*. That principle was, that instead of the arms being fixed as in an ordinary anchor, they moved upon axes, and the flukes were set upon them at an angle. It appears that by this arrangement greater biting and holding powers were obtained, and when the anchor was in the ground, by the upper fluke resting upon the shank, it was more out of the way, and less likely to be caught by the cable while the vessel was swinging, and the anchor itself was capable

of more compact stowage. The Petitioner, taking this anchor of *Porter's* as thus described, added the improvements for which he obtained his patent. These, according to his specification, consisted in making the horn or toggle for canting the anchor and opening the flukes wider than the arm, in affixing the palm of *Porter's* anchor intermediate of the breadth of the arms, and at the back of the arm instead of in front (it not being new to place the palm at the back of the arm of ordinary anchors), and in making the angles which the palms make to the shank, and those made by the arms, to be different. These variations from *Porter's* anchor, however slight and insignificant they may seem, were undoubtedly improvements upon it ; and the Petitioner, without the exercise of any great inventive ingenuity, perfected an anchor which has proved highly efficient and useful.

This anchor has been very extensively employed by the Mercantile Marine, and has invariably been found upon trial to possess holding powers superior to all other anchors. For some unexplained reason it has not been introduced into the Navy. In 1853, an Anchor Committee appointed by the Admiralty to determine the relative merits of different descriptions of anchors, after submitting them respectively to various tests, reported most favourably of *Trotman's* anchor. The Report stated that this anchor "proved to have greater holding powers than *Porter's*," and that when it was subjected "to trials with anchors on the Admiralty plan of the respective weights of thirty, thirty-five, and forty cwt. (stock included), no doubt was left upon the minds of the committee that in regard to holding power with a steady equable strain, *Trotman's* anchors were fully equal to Admiralty

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anchors of at least twenty-four per cent. greater weight.'"

It was proved in evidence, that after this report *Porter's* anchors went entirely out of use, and that the demand was for *Trotman's* anchors instead of them. Although, therefore, the merit of the improved anchor was originally due to *Porter* (or to *Logan*, who was before him in the field), the improvements introduced by the Petitioner have certainly tended to make the anchor practically more useful, and he has therefore, upon this ground a claim to consideration in his present application.

But admitting the merit of the Petitioner, the question to be next considered is the sufficiency of his remuneration. There is this peculiarity in his case, that instead of becoming himself a manufacturer of his patented anchors, he has preferred to grant licenses to Ironsmiths to manufacture them on their own account, paying him a royalty. In all prior applications for the extension of the term of a Patent the Patentee has himself made and sold the patented article, either exclusively or in common with other persons to whom he has granted licenses, or he has assigned away his Patent altogether, so as to substitute his Assignee for himself in all questions respecting his Patent rights. In these cases there is obviously no difficulty in ascertaining the profit which has been derived from the Patent. It is supposed, however that the unusual manner of working the Patent in this case renders the application to a different principle necessary. This, however, is clearly a misapprehension. The question in all cases of this description is not what the Patentee has received, but what has been made, or by proper judgment and application

might have been made, by the Patent. The Petitioner might, if he pleased, have become the Manufacturer of his patented anchor. If he had, it would then have been necessary to ascertain what part of the profits of the manufacturing business ought to be ascribed to the Patent. In arriving at this result the proper course would have been to deduct the original cost of the anchor, the ordinary amount of Manufacturer's profits in the particular trade, and probably an allowance for the time and labour of management, and the remainder would then have been the profit due to the Patent. But the Petitioner was unwilling to incur a large expenditure in erecting the proper plant for carrying on the manufacture, and preferred to leave the expense of the new machinery necessary for forging his anchors to the Licensees, being content to receive a royalty as his share of the profits of the Patent business. Under these circumstances, if this royalty alone were to be regarded, it is evident that we should not arrive at a knowledge of the whole amount realized by the Patent, but that the question would be changed from what the Patent had produced to what it had yielded to the Patentee. It was necessary, therefore, for the favourable consideration of the Petition that the Patentee should bring into account the profits obtained by the Licensees in respect of the Patent. He has however not furnished any information upon this point ; for although he has proved that the Licensees paid him royalties amounting to £15,000, being five per cent. upon the £300,000, the gross amount of their business, he has not enabled their Lordships to ascertain how much of this large sum is applicable to the cost of the manufacture, and what per-centage of it belongs to the Patent monopoly.

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In the course of the argument for the Petitioner, a case was supposed of a person patenting an invention of a particular kind of bread, and granting licenses for the sale of it to a very large number of Bakers, and it was asked whether in such a case it would be necessary for him, in applying for a prolongation of the term of his Patent, to prove the amount of the profits made by all the Licensees in respect of the patented article. The answer is, that he would undoubtedly be bound to furnish this proof. It must always be borne in mind that the extension of the term of a Patent is matter of favour, not of right; and that it is essential to the favourable consideration of the Patentee's application, that he should distinctly prove how much the public have had to pay, or, in other words, how much has been received on account of the Patent. If, therefore, the Patentee has dealt with his Patent rights in such a manner that when the time arrives for asking for a renewal of his term, he has put it out of his power to give the requisite evidence upon which his application must to a great extent be founded, his petition must fail, because it wants the proof which is essential to its success. This is the case with the present Petitioner. He has left in complete obscurity the actual amount of profits realized by the Patent, which may, for anything that appears, be more considerable than in any former case in which a Patent has been extended.

The uncertainty in which the Petitioner has left this part of his case would be fatal to his application, even if he were entitled to all the deductions for his own share of the profits which he has claimed in his accounts. But their Lordships cannot forbear expressing their dissatisfaction with the manner in

which these accounts have been prepared. The Petitioner was in the situation of a person receiving a rent or royalty, having nothing whatever to do with the manufacture of the article from which this rent or royalty was derived. He had a right under the licenses (a specimen of which he had been furnished with) to visit the works of the Licensees at any time, "to view and inspect the method there used and employed in manufacturing anchors, and the quantities and values thereof." This power was reserved to enable him to ascertain, from time to time, the nature and amount of the business carried on, so as to provide him with a constant check upon the accounts of the royalties. It is very doubtful whether his journeys to the different works, for the purpose of watching over his interests, and seeing that the anchors were properly made, ought to be debited to the Patent; and there are annually questionable items introduced into the accounts, for many of which there are no vouchers. But these sums are insignificant in comparison with the item for "Patentee's allowance and subsistence-money for fourteen years at £350 per annum, £4,900." The Patentee, in his examination before their Lordships, at first gave them to understand that this sum partly represented the expense of his maintenance which he claimed to charge against the Patent, but he afterwards stated, that it was an assumed sum which he considered himself entitled to for his trouble and labour in generally superintending the manufacture of his anchors by the different Licensees. Taking it for granted that this is the correct meaning of this large item, it is difficult to understand upon what principle it can be maintained. It was no part of the covenant with the Licensees that the Petitioner

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should superintend their operations ; and if they required his assistance to instruct their workmen, they should have engaged him, and paid him for his services. If they had done so, this would have constituted a fair deduction out of the profits of the Licensees, and would have properly entered into the Patent account. But if an allowance for management were to be deducted from the royalty in ascertaining the amount of profit received by the Patentee, as the Licensees, in estimating their profits from the Patent, would be entitled to the deduction of an annual sum on the same account, the Patent would be debited twice with the same item of expense for management.

In the absence of all proof of the portion of the profits received by the Licensees, which the Petitioner was bound to adduce, and from the unsatisfactory nature of his accounts, their Lordships think that the Petitioner has not placed himself in a position which entitles him to their favourable consideration, and they cannot recommend any extension of the term of his Patent.

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ON APPEAL FROM THE SUPREME COURT  
OF CEYLON.

GEORGE JONES SAXON PAGE . *Appellant,*

AND

COWASJEE EDULJEE . *Respondent.\**

THIS was an appeal against a decision of the Supreme Court of *Ceylon*, setting aside a judgment of the District Court of *Columbo* in an action brought in that Court by the Appellant, as Plaintiff, against the Respondent, as Defendant.

2nd & 3rd  
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Action to recover the difference between the original price bid at a public auction, and the sum realized upon a re-sale, for the hull of a

\* Present—Lord Chelmsford, Sir James William Colville, and Sir Edward Vaughan Williams.

stranded vessel, sold by the Master and purchased by the Defendant, upon conditions of sale, which were appended to the memorandum of purchase, and signed after the sale by the Defendant's agent on his behalf; which conditions differed materially from those appended to the catalogue of sale, and which were the conditions read out at the auction.

The Defendant paid the deposit upon the terms of the conditions of sale read at the auction, and took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, and was soon afterwards, by order of the Board of Health, destroyed as a nuisance. The Defendant having declined to complete the purchase, the vendor resumed possession of the vessel, and re-sold it at a loss.

The form of the action was by libel, according to the Roman-Dutch Law. The Defendant in his answer, among other defences, denied that he had purchased under the conditions appended to the memorandum of sale, and prayed the dismissal of the action with costs; and in reconvention, for payment of the amount of the deposit and damages he had sustained, to the amount of £1,000, for loss of profits and advantages from the vessel, her tackle and implements.

The judgment of the District Court was in favour of the Plaintiff, the Judge of that Court being of opinion, that the Defendant purchased on the conditions of sale appended to the memorandum of purchase, and

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The Plaintiff was formerly the Master of the ship "*Nova Scotian*." The Defendant, a Parsee Merchant residing at *Columbo*, was the purchaser of the hull of the ship.

The libel of the Plaintiff stated, that the Defendant by a certain memorandum or agreement, which was annexed to the libel, had agreed to purchase the hull of the ship "*Nova Scotian*," for the sum of £1,000 according to certain conditions of sale annexed to the libel, by which it was stipulated, amongst other things, that the purchasers should pay to the Plaintiff a deposit of 10 per cent. on the purchase-money, on the transfer deed being executed by the Plaintiff, but if from any cause whatever the remainder of the purchase-money should not be paid, then that interest at the rate of 10 per cent. should be paid by the

that, according to those conditions, the Plaintiff had rightly resumed possession and re-sold the vessel. The Supreme Court on appeal reversed that judgment, and ordered judgment to be entered for the Defendant, being of opinion, that the Plaintiff having founded his claim upon an agreement which gave, among other things, a right of re-sale, with conditions different from those read at the auction, and having in consequence repossessed himself of the vessel and re-sold her, had thereby deprived himself of the right to recover from the Defendant, and awarded the Defendant the damages claimed by his answer :—

Held by the Judicial Committee (1), that though the merits of the case were with the Plaintiff, neither the judgment of the District or Supreme Court could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale ; and that the Plaintiff having sued upon a different contract, was not entitled to recover, and ought to have been non-suited : and (2), that in the absence of any evidence of damage, the Defendant was not entitled to judgment for damages :—

Held further, that although the act of the Plaintiff in retaking the hull of the ship and selling her was wrongful, and entitled the Defendant to bring an action of trover, it did not amount to a rescision of the contract.

If before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may be still due.

The rule applies where there has been a delivery, and the vendor afterwards takes the property out of the possession of the purchaser, and re-sells it.

Defendant until payment in full, but without prejudice to the right of the Plaintiff, in case the Defendant should fail or neglect to comply with the conditions, to treat the deposit money as forfeited, and to have the sale enforced, or to have the vessel re-sold at the option of the Plaintiff in terms of the conditions of sale ; and the libel stated that, although the Defendant had paid £250, in respect of the deposit of 10 per cent., and the Plaintiff had always been ready to carry out his part of the agreement, the Defendant refused to pay the balance of the purchase-money, and the Auctioneer's commission, and otherwise failed to comply with the terms of the agreement and conditions of sale, and that, therefore, the Plaintiff had caused the hull of the vessel to be sold at the risk of the Defendant, and at which re-sale no higher sum than £500 was offered, whereby the Plaintiff became entitled to recover from the Defendant a sum of £520, the deficiency on such re-sale, together with costs of the same as liquidated damages.

Annexed to the libel was the following memorandum of sale :—" That *Cowasjee Eduljee* declared the highest bidder for and purchaser of the ship '*Nova Scotian*,' hereinbefore described, at the sum of £1,020, at which sum he, the said *Cowasjee Eduljee*, doth agree to become the purchaser thereof accordingly, and also doth agree on his part to perform the conditions of sale ; and in consideration thereof the vendors do agree to sell and convey the said vessel unto the said *Cowasjee Eduljee*, his heirs and assigns, or as he shall direct according to the said before written conditions."

On the other side of the same paper on which the foregoing memorandum was printed and signed, were,

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partly written and partly printed, certain conditions of sale which differed materially from the original conditions appended to the catalogue. The condition required a deposit of 10 per cent. on the purchase-money, as pleaded in the libel, and the eighth condition gave a power of re-sale.

The Defendant by his answer pleaded as follows: first, he denied that he purchased the vessel subject to the conditions of sale alleged in the libel, and stated that, on the contrary, the vessel was advertised for, and was ultimately put up for sale, on entirely different conditions, which conditions of sale he annexed to his answer. Second, he stated that when the vessel was put up for sale he offered the sum of £1,020 for the same, and the offer being accepted, he paid the deposit of £250 in part of the purchase-money, and tendered the balance of the purchase-money, but that the Plaintiff refused to convey the vessel or to furnish the Defendant with the necessary documents for the preparation of a legal transfer. Third, that the vessel was subsequently taken possession of by the Board of Health, and on the ground that the same was a nuisance, was broken up, destroyed, and damaged. Fourth, that the Plaintiff had not at the time he offered the vessel for sale, and had never since, had the necessary power, right, or authority to sell the vessel, or to make a good conveyance thereof to the Defendant. Fifth, that the Plaintiff after the sale resumed possession of the vessel, and offered the same for sale. Sixth, that the agreement for the sale was invalid and inoperative, and contrary to law; and seventh, that by reason of the Plaintiff's non-performance of his agreement he had become and was liable to pay the Defendant the

um of £250; and in reconvention the Defendant leaded,—that he had sustained heavy loss and damage, aving been deprived of the profit and advantage hich would have accrued to him from the vessel hen repaired and floated, her tackle, implements, nd other articles, which the Defendant had also purchased, with a view of refitting the vessel, to the amage of £1,000.

The conditions of sale which were annexed by the Defendant to his answer, provided by the second condition for a deposit of 25 per cent. to be made on each lot, if required, at the time of the sale, but gave no power of re-sale and forfeiture of deposit in failure of compliance with the conditions.

The action was tried before Mr. *George Lawson*, the Judge of the District Court of *Columbo*, when the following facts were proved:—

Early in the month of *December*, 1862, the “*Nova Scotian*,” of which the Plaintiff was then Master, arrived at *Columbo*, and on the 18th of that month she was driven from her anchorage, and finally stranded near the harbour, a complete wreck. At the request of the Plaintiff, two surveys were held on the “*Nova Scotian*” by Captains of other ships then in port. Acting on their advice, the Plaintiff, as Master of the ship, advertised the ship for sale, for the benefit of all concerned. Catalogues and particulars of sale of the ship and stores were circulated in *Columbo* by the Auctioneers. Appended to the catalogue were certain printed conditions of sale, which were the same conditions as were filed with the Defendant’s answer. The sale took place on the 2nd and 3rd days of *January*, 1863. Before the sale commenced the Auctioneer read over the conditions of sale

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attached to the catalogue. The hull of the ship was sold for £1,020, to the Defendant's agent. Defendant was present at the sale, and purchased several other lots put up for sale, consisting of tackle stores, &c. After the sale, the Defendant's agent, in his presence, signed, at the request of the Auctioneer, a memorandum in the form annexed to the Plaintiff's libel. The conditions of sale were not those originally appended to the catalogue of sale, but were substituted for them. There was conflicting evidence as to whether they were read over in the presence of the Defendant and his agent, by the Auctioneer or Clerk, before the memorandum of the sale was signed. The Defendant paid the deposit of 25 per cent., stipulated by the original conditions, and received from the Auctioneers authority to take possession of the wreck, which he accordingly did. Application was made to the Plaintiff by the Defendant for a Ship's Register, which the Plaintiff refused, having received the advice of the Collector, sent the same to the Custom-house, to be transmitted to the Port of Registry in *England*, for the purpose of being cancelled pursuant to the provisions of the Merchant Shipping Act, 17th and 18th *Vict.*, c. 104, sec. 53. On the 8th of *January*, 1863, the Defendant received a notice from the Board of Health, ordering him to discharge the cargo forthwith, or within a week, and on the next day he was informed that the Board of Health intended to destroy the ship, as a nuisance, on the following morning; and accordingly the ship was blown up on that day. On the 12th of *January*, the Auctioneer, by letter of that date, applied to the Defendant for payment of the balance of the purchase-money. The Defendant declined to pay the balance, and claimed

ave his deposit returned, upon the ground that the laintiff had failed to comply with his agreement, and as unable to carry it out, as the ship was destroyed. he Auctioneers gave notice by letter to the Defendant at they should re-sell the ship at the Defendant's risk in terms of the conditions of sale, and the ship as accordingly re-sold by auction, and fetched the sum of £500.

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The Judge of the District Court found, that as it appeared from the memorandum of sale that there was a plain and distinct reference to certain conditions written on the same paper, and as the Defendant's Agent, in signing that document, must have learned that they were incorporated with the memorandum, or might have done so but for his own neglect, the Plaintiff had proved that the Defendant purchased the vessel subject to the conditions annexed to the libel: and he added, that there was no pretence for imputing fraud to the Plaintiff or his Agents: he further found, that the Plaintiff had always been ready and willing to transfer the vessel, and that he was justified in refusing to furnish the Defendant with the Register: and he held, that the Plaintiff was not bound to prove his right to sell the vessel, as the Defendant had dealt with him as having authority to sell: that the Board of Health did not take possession of the ship or injure it until after the property had passed to the Defendant and was at his risk, and that the injury done to the ship by a third party after the property had vested in the Defendant, and possession had been delivered to him, was no ground for rescinding the contract. That the Plaintiff was justified in resuming possession of the ship by the conditions of sale; and that as to the contract being void and illegal



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because the vessel was a nuisance, there was no evidence that the ship was a nuisance at the time of the sale, and not sufficient to prove that she was so, and abandoned by the Defendant. The Court, therefore, found against the Defendant on all the pleas pleaded by his answer, and judgment was entered for the Plaintiff for £373. 1s. and costs.

The Defendant appealed from this judgment to the Supreme Court of the Island, on the following amongst other grounds, first, that it was established that the vessel had been sold on the conditions appended to the catalogue of sale, and not on the conditions produced by the Plaintiff; and, secondly, that the Defendant having purchased the vessel on the conditions appended to the catalogue, could not be subsequently burdened with other and different conditions.

On the 24th of November, 1863, Sir Edward Creasy, the Chief Justice, delivered the judgment of the Court, whereby the judgment given by the District Court in favour of the Plaintiff was set aside, and judgment for the Defendant, with costs, ordered to be entered. The Chief Justice, in delivering the judgment of the Court, after stating the averments in the libel and answer, proceeded in these terms: "The hull of the '*Nova Scotian*' was sold by auction, and appears to us to be quite clear on the evidence that the conditions of sale, which were circulated before and during the auction, and which were read out by the Auctioneer at the commencement of the sale, were not the conditions relied on by the Plaintiff as annexed to his libel, but were a different set of conditions which the Defendant has annexed to his (the Defendant's) answer. These last-mentioned set of

conditions contain nothing to give the vendor a power of re-sale in the event of the purchaser making default—they stipulate for a payment of 25 per cent. deposit. The Defendant was the highest bidder for the hull of the stranded ship and the lot was knocked down to him. In the ordinary course of auction sales he thereby became the purchaser, according to the conditions which the Auctioneer had read out, and subject to the necessity of complying with any statutory requisites as to such sales, whether imposed by the Imperial Legislature or by the Ordinances of this Colony. No point was made in the argument of the case, as to the non-compliance with the provisions of the Merchant Shipping Acts, as to the mode in which property in a ship can be transferred. We do not think it necessary to consider that point in this judgment, because it is a clear fact in the case, that no such formal transfer of the ship was here made at all. If such a formal transfer is indispensable in order to give validity to the sale, or to make it amount to at least a valid agreement for a sale, the Plaintiff is out of Court for default of such a transfer having been effected. After the sale, the Defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance, No. VII. of 1840, sec. 21; and the sale and purchase of the ship's hull were thereby made valid and completed according to our Colonial laws, and unquestionably the sale and purchase were made, and the deposit paid, under the conditions of sale read at the auction, and not under those which the Plaintiff sets up, but of which not a word had been said in the transactions until after the deposit money was paid. After the payment of the

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deposit a set of conditions of sale, which do contain a clause of re-sale, and which are annexed by the Plaintiff to his libel, were signed by the Defendant's agent at the Auctioneer's office. The evidence of the parties as to the precise circumstances under which they were signed is not uniform. We have no doubt that the Defendant's agent signed them in the confidence that they were identical with those read out at the sale. But even if he knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a re-sale, such free agreement would be insufficient to maintain an action being entirely without consideration. It has been urged that the right of re-sale always exists, and that the vendor had it here independently of the stipulations in the signed set of conditions of sale. This is clearly shown not to be law by the case of *Martindale v. Smith* (a) and other authorities, cited in *Tudor's Leading Cases on Mercantile and Maritime Law* p. 530, *et seq.*"

The effect of this judgment was to condemn the Plaintiff to pay the Defendant the several sums of £250, the amount of the deposit, and £1,000, claimed in his answer for damages.

The Plaintiff appealed from this judgment to Her Majesty in Council.

Mr. *Mellish*, Q.C., and Mr. *Watkin Williams*,  
for the Appellant:—

This, though an action brought by the Plaintiff as Master of the ship "*Nova Scotian*," to recover damages from the Defendant for the non-fulfilment of a contract for the purchase of the hull of that vessel

which had become a wreck, has been so dealt with and treated in the Court below as to have the effect of an action by the Defendant against the Plaintiff to repudiate the contract of sale upon the ground of fraud, no fraud being alleged or proved ; and damages to the amount of £1,000 have been given against the Plaintiff, without any evidence of damage sustained, or materials from which it could be inferred, but simply upon the Defendant's claim in reconvention made by his answer. That is the consequence of the judgment of the Supreme Court, which did not simply reverse the judgment of the District Court, but actually gave judgment for the Defendant, with costs. It is as if the Defendant had originally brought an action against the Plaintiff, to repudiate the contract of sale, which the Plaintiff had sued on. This is irregular, and cannot upon any principle of pleading be sustained, and on that ground alone we submit that the judgment of the Supreme Court cannot stand. But both the merits and the law are with the Appellant, and were rightly so held by the District Court. The vessel was a wreck, and the Master, in the circumstances, properly sold her ; *Cambridge v. Anderton* (a) ; *Farnworth v. Hyde* (b). The memorandum of sale, signed by the authorized agent of the Respondent, was, in the absence of fraud, the only admissible evidence of the terms upon which the Appellant sold and the Respondent purchased the ship ; *Acebal v. Levy* (c) ; *Hochster v. De La Tour* (d). Up to the time of the signing of the memorandum of agreement there was not a complete contract of sale under the law of the Island. *Ceylon Ordinance*, No.

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(a) 2 Bar. & Cr. 691. (b) 5 New Reps. 488.

(c) 10 Bing. 376. (d) 2 El. & Bl. 678.

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VII., of 1840, which, by clause 21, part 3, requires either a written contract, signed by the parties making the same, or by some person thereto lawfully authorized by him, on the delivery of the whole or part of the thing sold, or on payment of the whole or part of the purchase-money. The case of *Martindale v. Smith (a)*, cited by the learned Chief Judge in the judgment of the Supreme Court, is not in point. That was an action of trover for goods sold but not delivered, after part payment of the purchase-money in pursuance of an agreement executed at the time of sale, which fact differs from the present case; *Milge v. Kebble (b)*. There is no implied warranty of title in the contract of sale of a personal chattel; this was held in *Morley v. Attenborough (c)*, *Eichell v. Bannister (d)*. The evidence shows that the Appellant had been at all times ready and willing to carry out the terms of the contract, and that the Respondent had made such default as entitled the Appellant to proceed to a re-sale at his risk: *Hadley v. Baxendale (e)*. According to the conditions of sale appended to the memorandum, the purchaser was bound by the contract executed, and the ship being wrecked, there was a right of re-sale without any special clause to that effect. *Chinerey v. Viall (f)* shows what may be the measure of damage. The re-sale of the vessel was not a rescinding of the original contract. *Stephens v. Wilkinson (g)*; *Fitt v. Cassanet (h)*; *Gillard v. Brittan (i)*; *Greaves v. Ashlin (k)*. A

(a) 1 Q. B. Rep. 389. (b) 3 Man. & Gr. 100; 3 Scott. N.S. 353.  
(c) 3 Ex. Rep. 500. (d) 34 L. J. (C.B.) 105; 5 New Rep. 5.  
(e) 9 Ex. Rep. 341. (f) 5 H. & N. 258.  
(g) 2 Bar. & Ad. 320. (h) 4 Man. & Gr. 898.  
(i) 8 Mee. & Wel. 575. (k) 3 Camp. 426.

clause of re-sale is usual in sales in the *East Indies*; *Chitty* on Contracts, p. 391 (7th Ed.); *Blackburn* on Contracts of Sale, p. 329. With regard to the objection to the non-delivery of the Register, that was not requisite, as under the 53rd section of the Merchant Shipping Act, 17th & 18th Vict., c. 104, the certificate of a ship lost, or ceasing to be a British ship, must be delivered up to the British Consul of the nearest port, to be transmitted by him to the port of Registry: *MacLachlan* on the Law of Merchant Shipping, p. 80.

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Mr. F. Stiffe Everitt, for the Respondent.

First, the contract for sale was complete upon the purchase, the Respondent being declared the highest bidder, and that being so, the conditions appended to the printed catalogue, read at the auction, were the conditions subject to which the Respondent bought, and not the conditions substituted at the time of the signing of the memorandum of purchase by the Respondent's agent on his behalf. There was no right of re-sale in the conditions under which the Respondent purchased. All the Appellant was entitled to, if he had any remedy, was to affirm the contract, if it was one of sale, and bring an action for the balance of the purchase-money; but even that remedy was abandoned by the Plaintiff's resuming possession of the hull of the ship and re-selling it; and the claim made to recover the difference of the original purchase-money, allowing for the amount realized by the re-sale, cannot under any circumstances be supported. On the contrary, the Respondent was entitled, and was rightly so held by the Court below, not only to have the contract rescinded, as null and void, but to the

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damages claimed by him in his answer for the breach of it by the Appellant; *Hagedron v. Laing* (a); *Martindale v. Smith* (b); *Maclean v. Dunn* (c). As to the general power of re-sale in case of repudiation of the contract, all the authorities are collected in *Addison on Contracts*, pp. 205-6 (5th Edit.). The sale of the ship by the Master, without the consent of the owner, could only be justified by proof of urgent circumstances, which proof is not afforded here. See *"Margaret Mitchell"* (d); *The "Bonita"* (e) *Tudor*. Leading cases on Mercantile and Maritime Law, p. 530 *et seq.*

Secondly, the mode of pleading though by English procedure may be thought inconvenient, in accordance with the practice prevailing in the Courts in the Colony, being founded on the Roman-Dutch law which is in force in *Ceylon*, and which allows a counter claim by reconvention, such as made by the Respondent's answer; the decree, therefore, is consistent with both the law and practice of the colony. It is not necessary now to insist on the non-delivery of the Ship's Registry, because the whole transaction, with respect to the sale, was vitiated by the act of the Appellant.

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Their Lordships' judgment was delivered by

LORD CHELMSFORD.

This is an appeal from a judgment of the Supreme Court of *Ceylon* reversing a judgment of the district

(a) 6 Taunt. 162.

(b) 1 Q. B. Rep. 389.

(c) 4 Bing. 722.

(d) Sw. 382.

(e) Lush. 252.

Court of *Columbo* in favour of the Appellant (the Plaintiff in the suit), and ordering judgment to be entered for the Defendant (the Respondent), with costs.

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The action was brought in the district Court to recover the balance of a sum of £1,020, the amount at which a stranded ship called "*Nova Scotian*," was sold by the Plaintiff, the Master, and purchased by the Defendant under the following circumstances.

The "*Nova Scotian*" had arrived at *Columbo* in the month of *December*, 1862, and was lying there at anchor with a cargo of rice on board, when on the 18th of that month, she was driven from her anchorage and stranded on the beach near the harbour.

Before her stranding, the "*Nova Scotian*" appears to have been worth £9,000, and she was under insurance for £7,000, but the Plaintiff thought that her back had been broken by the stranding, and in his opinion it would have cost from £1,500 to £2,000 to get her afloat again.

Under these circumstances the Plaintiff caused two surveys to be held on the "*Nova Scotian*," and acting upon the judgment of the surveyors, and under their advice, he advertised her, with her tackle and apparel, for sale by auction on the 2nd and 3rd days of *January*, 1863.

The sale took place on the days named. The property sold was arranged in sixty-eight lots, the vessel being the last lot in the catalogue, and was offered for sale separately from her sails, stores, spars, masts, and rigging, which were included in prior lots.

The catalogue of sale was headed "Catalogue and particulars of the sale of the ship '*Nova Scotian*,'"



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of *Liverpool*, 999 tons, built 1860, as she now lies stranded opposite the *Racket Court*, condemned on survey to be sold on account and for the benefit of the concerned, with all her sails, stores, &c."

The conditions of sale were printed at the foot of the catalogue, and were read out in the room by the Auctioneer before the sale commenced. By one of these conditions a deposit of 25 per cent. was to be made on each lot, by another, all goods were to be at the risk of the purchaser from the time of sale, and by a third, all custom's duty was to be paid by purchasers. The Defendant's son-in-law attended the sale, and by his authority bought several of the lots consisting of the tackle, sails, spars and other articles belonging to the vessel, and the vessel herself was afterwards knocked down to him at the sum of £1,000.

No memorandum was signed in the auction-room either by the Auctioneer or by the Defendant's agent, but after the sale (whether on the same or a subsequent day does not appear) the Defendant's son-in-law, on his part, and the Auctioneer on behalf of the Plaintiff signed a memorandum to the following effect. [His Lordship read the memorandum, *ante*, p. 501.]

The conditions referred to in this memorandum which were on the other side of the paper, varied from the conditions read out in the auction-room in these particulars. Instead of a deposit of 25 per cent., the purchaser was to pay only 10 per cent. There was no condition that the goods were to be at the risk of the purchaser from the time of sale. The purchaser was to pay the Auctioneer's commission as well as custom's duty, and this important condition was added:—"Should the purchaser neglect or fail to comply with these conditions, his deposit money shall be forfeited."

and the sale may be enforced, or the vessel may be re-sold at the option of the vendors, and in case of a re-sale, the increase (if any) of the purchase-money shall be retained by the vendors, and the deficiency (if any) and all costs and expenses shall be made good by the defaulter at the present sale, and be recoverable as liquidated damages."

There is conflicting evidence as to whether these conditions were read out when the memorandum was signed. The defendant's son-in-law, who signed for him, stated in his evidence that he "signed the memorandum while it was lying on the table, and did not know what was underneath." That "the only conditions which he knew anything about were those attached to the catalogue."

The defendant undoubtedly thought the sale was to be completed by his signing a memorandum upon the conditions contained in the catalogue, as appears from the fact of his having paid £250 immediately before the memorandum was signed, being a deposit of 25 per cent. upon the purchase-money, in accordance with these conditions. It was also proved that when the £250 was paid a receipt was asked for, and the Auctioneers replied that it was unnecessary, as the memorandum to be signed would be enough, a representation which would materially strengthen the belief of the Defendant that the conditions contained in the catalogue were those to which his purchase was subject.

The Defendant having received authority from the Auctioneers, went himself to take possession of the vessel, and directed two anchors to be put out, to prevent her drifting further on the shore. On the 8th of *January* he received a notice from the Board

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of Health to discharge the cargo of rice, which had become heated and was occasioning a nuisance. This not having been done, the Board proceeded to destroy the vessel by firing into her.

A bill of sale was prepared by the legal agent of the Defendant, but before it was tendered for the Plaintiff's signature, a demand was made upon him to deliver the certificate of Registry to the Defendant. The Plaintiff refused to comply with this demand, on the ground that the vessel having become a wreck, it was his duty to give up the certificate to the collector of customs for transmission to *England* under the provisions of the Merchant Shipping Act, 1854.

On the 12th of *January*, 1863, the Auctioneers Messrs. *Ledward & Co.*, wrote to the Defendant the following letter:—"We have the honour to annex on the other side the particulars of the balance of our claim on account of the sale to you of the ship '*Novo Scotian*,' which we have been required to settle forthwith, and we must request you will enable us to do so this day. We hereby undertake, on account of Captain *Page* and ourselves, to complete the bill of sale when tendered."

To this letter the defendant replied on the 13th of *January*:—"In answer to your letter of yesterday's date, I beg to inform you that the Captain having failed to comply with his agreement, and having sold the vessel under circumstances which led to its subsequent destruction, and being now, as you are aware, unable to carry out the agreement, I decline to pay the balance of the purchase-money, and shall look to you and the Captain for the repayment of my deposit, and the damages which have occurred to me by reason of your default."

On the receipt of this letter, Messrs. *Ledward & Co.* wrote to the Defendant on the 14th of *January* in these terms :—" As in your letter of yesterday you decline to pay us the balance of the purchase-money for the hull of the '*Nova Scotian*' and other articles purchased by you at public auction, we beg to give you notice that the same, after due publication, will be re-sold at your risk in terms of the conditions of sale."

The ship was accordingly again put up to sale and sold for £500, and the Plaintiff brought his action to recover the difference between the original price and the sum realized upon the re-sale, together with the Auctioneer's commission, the balance claimed, after giving credit for the Defendant's deposit of £250, being £383. 11s.

The libel of the Plaintiff (to which was annexed the memorandum signed on the part of the Defendant and the conditions therein referred to, which the Plaintiff prayed might be taken as part of the libel) alleged, that the Defendant agreed to purchase the hull of the ship '*Nova Scotian*,' as she then lay stranded on the beach, for the sum of £1,020, according to certain conditions thereunto annexed, and amongst them the stipulation that the purchaser should pay a deposit of 10 per cent. in part payment of the purchase-money, and should pay the remainder on the transfer deed being executed ; but if the remainder of the purchase-money should not be paid, interest at 10 per cent. should be paid by the Defendant until payment in full, but without prejudice to the right of the Plaintiff (in case the Defendant should fail or neglect to comply with the conditions) to treat the deposit money as forfeited, and to have the sale enforced or to have the vessel re-sold, at the option of

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the Plaintiff, in terms of the conditions of sale. The libel then alleged the payment by the Defendant of the deposit of £250, his failure to pay the remainder of the £1,020, and the re-sale of the vessel in terms of the conditions of sale, and claimed the deficiency of the re-sale, together with all costs and charges attending the same, as liquidated damages.

The Defendant's answer, in the only parts of it necessary to be noticed, consisted of—First, a denial that he purchased the vessel on the conditions in the libel mentioned, for that the vessel was put up for sale on entirely different conditions, to wit, the conditions appearing in the annexed document marked letter A (being the catalogue and the conditions therein contained). Second, that although the Defendant was ready and frequently offered to pay the remainder of the purchase-money, yet the Plaintiff would not convey the vessel nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance. Third, that the Plaintiff had not at the time of the sale, and has never since had, the necessary power, right, and authority to sell the vessel or make a good conveyance thereof. Fourth, that the Plaintiff had since resumed possession of the vessel, and offered the same for sale; and the Defendant prayed that the Plaintiff's suit might be dismissed with costs, and the Plaintiff be condemned in reconvention to repay the deposit of £250, and to pay damages to the amount of £1,000, for the loss of the profit and advantage which would have accrued to him from the vessel when repaired and floated, as well as from the loss of the tackle, implements, and other articles belonging to the vessel, and which had since become useless for that purpose.

The case was tried in the District Court of *Columbo*, witnesses being examined on both sides, and the Judge of that Court ultimately decided all the issues in favour of the Plaintiff. He found that the Defendant purchased the vessel subject to the conditions annexed to the libel. That the Plaintiff had authority as Master to sell. That as the vessel was sold as a wreck, the Master was bound to forward her Register to the Collector of Customs for transmission to the port of Registry, and that it was not necessary for the Defendant to have the certificate in order to enable him to prepare the bill of sale; and that the Plaintiff was justified by the terms of the contract of sale in resuming possession of the vessel and selling her, and he ordered judgment to be entered for the Plaintiff for £373. 1s., being the amount which he claimed, less £10. 10s., said to have been paid by him to Counsel, which the Judge thought he was not entitled to recover from the Defendant.

Upon appeal by the Defendant from this judgment to the Supreme Court, it was set aside, and judgment ordered "to be entered for the Defendant with costs." It was stated at the Bar that there was no other record of this judgment than the one printed with the papers, and it was assumed on both sides that although it is in the general form just stated, it has the effect of entitling the Defendant to the return of his deposit and also to the damages of £1,000, which he prays by his answer.

The ground upon which the Supreme Court decided the appeal in favour of the Defendant seems to have been that the Plaintiff having founded his claim upon an agreement with conditions varying from those in the catalogue, in respect of their containing a clause

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of re-sale, and the Court being of opinion that upon the facts proved, the Defendant did not enter into an engagement containing any such condition; the Plaintiff having wrongfully repossessed himself of the vessel and re-sold her, had deprived himself of his right to recover the price from the Defendant.

That this was the view of the case taken by the Court appears from the learned Chief Justice having adverted to the argument on behalf of the Plaintiff that the right of re-sale existed independently of the stipulations in the signed set of conditions of sale, which he showed not to be law by a reference to the case of *Martindale v. Smith (a)*, and other cases referred to in *Tudor's Leading Cases*, p. 530.

As the District Judge decided in favour of the Plaintiff, there was no occasion for him to consider whether the payment by the Defendant of the £250 in part of the purchase-money, did not bind the parties to the contract of sale as completely as if there had been a written memorandum. But the Supreme Court did not take that fact into their consideration and with reference to it the Chief Justice said:—  
 “After the sale the Defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance, No. VII., 1840, section 21, and the sale and purchase of the ship's hull were thereby made valid and completed according to our Colonial laws, and unquestionably the sale and purchase were made, and the deposit paid under the conditions of sale read at the auction, and not under those which the Plaintiff sets up.”

(a) 1 Q. B. Rep. 389.

The Supreme Court, therefore, must have been of opinion, that there was a binding agreement for the sale of the vessel between the parties. If, therefore, the Plaintiff had correctly stated his claim in his libel, and had founded it (as he ought to have done) upon a sale according to the conditions read in the auction-room, he would clearly have been entitled to judgment, unless any of the objections contained in the answer of the Defendant would have been available as a defence.

Their Lordships agree with the Supreme Court in thinking, that there was no agreement substituted for the one commenced in the auction-room and completed by the payment of the deposit, but they must express their dissent from the opinion expressed by the Chief Justice, that if the Defendant "knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a re-sale, such fresh agreement would be insufficient to maintain an auction, being entirely without consideration," as, under such circumstances, the relinquishment of the first agreement would undoubtedly amount to a sufficient consideration. Their Lordships do not doubt that the contract completed by the payment of the deposit might have been varied by the signature subsequently of a memorandum inconsistent with it. Their opinion is founded on the particular circumstances of this case—the acceptance of the deposit under the terms of the conditions read out in the auction-room, the silence of the seller on the subject of any changes in the conditions, and the above-mentioned conversation at the time of the receipt of the deposit. If the Plaintiff had properly framed his libel, precisely the same defences might have

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been set up as are now contained in the Defendant's answer, and, therefore, in order to prepare the way for a decision upon the real merits of the case, it is necessary to consider the objections which the Defendant has urged to the Plaintiff's right to recover in the present action.

Taking these objections a little out of the order in which they are stated in the answer, the first to be considered will be, whether the Plaintiff had power, right, or authority to sell the vessel. Upon this issue there seems to be no reasonable doubt that the Plaintiff could convey a good title to a purchaser as against his owner. The vessel was lying stranded upon the beach, without the possibility of getting her off except by the expenditure of a large sum of money. The Plaintiff, not trusting to his own judgment alone, procured surveys to be made, and, proceeding upon the advice of the surveyors, determined to sell the vessel; a course which, it is reasonable to believe, the owner would have pursued upon a view of all the circumstances if he had been upon the spot. But supposing the Plaintiff to have acted upon a mistaken view of the necessity of the case, the Defendant could not insist upon there being any implied warranty of title. The Plaintiff sold the vessel in the special character of Master, and not as owner, and acted upon a *bonâ fide* belief of his authority to sell. The vessel was advertised as a stranded vessel, and the Defendant had every opportunity of examining her, and ascertaining whether she had been brought into such a condition as to give the Master authority to sell her as a wreck.

The next point to be considered in the Defendant's answer, is the allegation that the Plaintiff did not

convey the vessel, nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance. This relates to the refusal of the Plaintiff to deliver the certificate of Registry to the Defendant. According to the *Ceylon* Ordinances, No. V., 1852, the law to be administered in this case is the law of *England*. Now, by the 53rd section of the Merchant Shipping Act, 1854, where a Registered Ship is actually or constructively lost, the Register is to be sent to her port of Registry. The Defendant could not, therefore, be entitled to demand its delivery to him, and to refuse to execute the Bill of sale upon the non-delivery.

The next part of the answer which requires attention is that in which the Defendant justifies his refusal to perform his contract in consequence of the Plaintiff having resumed possession of the vessel, and offered her for sale. It was upon this ground that the Supreme Court considered that the Defendant was entitled to their judgment. If the Plaintiff could have proceeded upon a sale on the conditions annexed to the libel, in which there was a power of re-sale, this defence would necessarily have been excluded; but even if he had rightly claimed upon the contract which took place in the auction-room, it would not have been a sufficient answer to the action. In this case the vessel had been delivered to the Defendant, and he was in complete possession. The act of the Plaintiff in retaking and selling her was wrongful, and entitled the Defendant to bring an action of trover, but did not amount to a rescission of the contract. If, when the Defendant declined to pay the balance of the purchase-money, and altogether repudiated the agreement, the Plaintiff had taken him

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at his word, and resumed possession without anything more being said, the case might have been different but, instead of the Plaintiff agreeing to take the vessel back, and rescind the contract, he gave express notice to the Defendant that the vessel would be sold at his risk, "in terms of the conditions of sale." There is no case to be found in the Books where after a sale and complete delivery of a chattel, at the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martin v. Smith (a)*, and other cases, have determined that where there is an agreement to purchase property to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point that if before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so where there

(a) 1 Q. B. Rep. 389.

has been a delivery, and the vendor takes it out of the possession of the purchaser and resells it.

Their Lordships have entered thus fully into the various defences contained in the Defendant's answer, in order to show that the merits of the case are entirely with the Plaintiff; and that, if he had rightly conceived his action, he would have been entitled to recover; but he unfortunately has chosen to proceed upon a different contract from that which he established by proof. The Supreme Court rightly overruled the decision of the district Judge, and held that there was no other agreement between the parties than the one which proceeded upon the conditions read out in the auction-room. But, upon their view of the case, they ought to have directed a nonsuit to be entered, and not have given judgment for the Defendant, much less a judgment which, according to the admission of the Counsel on both sides, gave the Defendant the whole of the damages claimed in his answer. No evidence was given of any amount of damages having been sustained by the Defendant; and the claim, in respect of the assumed loss of the tackle, implements, and other articles belonging to the vessel, which were bought at the sale before the vessel herself was knocked down to the Defendant, cannot be entertained. It is impossible to sustain either the Judgment of the Supreme Court or that of the District Judge. If the judgment of the latter were to be upheld, founded as it is upon the establishment by the Plaintiff of his right to resell the vessel under the power contained in the conditions of sale, the judgment would be an answer to any action which might be brought by the Defendant for the wrongful act committed by the Plaintiff in selling his property.

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It is unfortunate that the Plaintiff should have brought forward his undoubted claim upon erroneous grounds, and their Lordships wish it to be distinctly understood that in their opinion the Plaintiff would be entitled, upon a libel properly framed, to recover the price of the vessel, less the deposit; and that none of the defences pleaded would be available to the Defendant in such an action. The Defendant, on the other hand, would be entitled to recover damages in an action of tort founded on the retaking of possession and re-sale of the vessel; and these damages would probably be measured by the price which the vessel realized on the re-sale. Their Lordships, therefore, trust that the parties will see the propriety of preventing further litigation by an arrangement, in which the fair and just terms must be obvious. As the matter stands before them, they are compelled to recommend to Her Majesty that the judgment of the Supreme Court, and that of the district Judge, be set aside, and a nonsuit be entered, and that there be no costs of this appeal on either side.

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ON PETITION FROM THE SUPREME COURT  
OF VICTORIA.\*IN RE THE ATTORNEY-GENERAL FOR THE COLONY OF  
VICTORIA.

IN this case a petition was presented by the Attorney-General of the Colony of *Victoria*, for special leave to appeal from judgments in several actions, in the nature of petitions of right, brought in the Supreme Court in that Colony against Her Majesty, in which verdicts were obtained in favour of the Plaintiffs against the Crown.

It appeared from the statements in the petition, that in the year 1865, a number of petitions under the Colonial Act, 28th *Vict.*, No. 241, "To consolidate the law relating to the recovery of Crown property, and the enforcement of the claims against the Crown," were filed in the Supreme Court of the Colony, by various parties as Plaintiffs, against the Crown, to recover sums of money paid by them and received on behalf of Her Majesty in respect of duties of customs

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Several actions in the nature of Petitions of Right, were brought against the Crown in *Victoria* under the Colonial Act, 28th *Vict.* No. 241, and judgments obtained against the Crown; but the Supreme Court of that Colony refused leave to appeal to *England*, in some cases, because the amount recovered was under £500, the appealable value prescribed by the Order in

\* Present:—The Lord Justice Knight Bruce, the Lord Justice Turner, and Sir Edward Vaughan Williams.

Council of the 9th of June, 1860, and in other cases, except upon terms of the Attorney-General in the Colony paying the amount of the verdicts with costs.

In giving leave to appeal, upon special petition for that purpose, the Judicial Committee refused to sanction the terms imposed by the Supreme Court on the Attorney-General of finding security for costs of the appeals, and admitted the appeals without security being given.

Appeals directed to be consolidated and heard as one case.

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authorized by a resolution of the Legislative Assembly, which resolution the Plaintiffs contended was unconstitutional, and the levy of the duties thereunder illegal, and upon which petitions verdicts were obtained by the Plaintiffs against the Crown. Leave was reserved to the Crown to move for nonsuits in all the cases, on the ground that the cause of action was not a claim or demand within the meaning of the 28th *Vict.*, No. 241, as held by the Court on the trial. These rules were, after argument, discharged, and judgments given by the Court in favour of the several Plaintiffs, whereupon the Attorney-General applied to the Supreme Court for leave to appeal to Her Majesty in council against such several judgments. The Supreme Court, however, refused such leave, except upon the terms of his paying the amount of the verdict and costs in each case (the Plaintiffs giving security to return the money in the event of the appeals being successful); and of consolidating the appeals in such actions, and absolutely refused leave to appeal in two of the cases, on the ground that the amount of verdict was under £500, the prescribed appealable value (a). The Attorney-General of *Victoria*, on behalf of the crown, offered to consolidate the appeals, but refused the other condition sought to be imposed, inasmuch as it indirectly interfered with the personal obligation imposed on the Governor of the colony under Act, No. 241, and the provisions in sections 24 and 25 of the Audit Amendment Act of *Vict.*, No. 86, of causing payment to be made of money for which a verdict may be obtained in a suit against the Queen under Act, 28 *Vict.*

(a) See Order in Council, 9th June, 1860.

No. 241, and in his petition to the Queen in Council for leave to appeal, he submitted, that the privileges of the Crown, and the duties of the Governor, were involved in the judgments and decisions of the court, and that with respect to the two cases said to be under appealable value, the matter in issue indirectly involved a much larger amount than £500, and, therefore, brought the cases within the rule of the Privy Council, provided by the Order in Council, and he prayed for special leave to appeal from the judgments and decisions of the Supreme Court on the rules in all the several cases, and from the judgments in demurrer in such cases, as in his petition were set forth, and that he might prosecute such appeals.

The application was *ex parte*.

The *Attorney-General* (Sir R. Palmer), and Mr. *Kekewich*, in support of the petition,

Submitted, that the actions brought against the Crown in the Court below, being by parties who had been compelled to pay duties levied under a resolution of the House of Assembly, were improperly brought under the Colonial Act, 28th *Vict.*, No. 241, which was not applicable to such cases, the remedy there given being expressly confined by the 25th and 27th sections to cases of contract made on behalf of the Crown. That the legality of the levy of the duties claimed involved a constitutional question of the right of the House of Assembly to authorize such levy by its single resolution; and that both as regarded the value of the subject matter at issue, as well as the terms proposed for the allowance of the appeals by the Supreme Court, Her Majesty's Attorney-General in the Colony ought not to be precluded from appealing on the

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ground of the pecuniary amount of the verdict being under £500, as the question at issue was of a greater value in the aggregate; that the Petitioner was ready to allow the consolidation of all the cases into one appeal. It was insisted also, that the Petitioner ought not, as Attorney-General of the Colony, to be called upon to give security for costs: *The Attorney-General of Isle of Man v. Cowley* (a).

The LORD JUSTICE KNIGHT BRUCE :—

Their Lordships think, in the circumstances of the case, there should be leave to appeal, and without giving any opinion as to the power of imposing terms or the manner of enforcing them if imposed, they are of opinion that there should be no terms imposed, and that there should simply be leave to appeal, so that security for costs should not be required. The appeals in all the cases are to be consolidated.

(a) 12 Moore's P. C. Cases, 27.

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ON PETITION FROM THE SUPREME COURT  
OF VICTORIA.

ELIZABETH WEBSTER AND OTHERS - *Appellants.*

AND

HERBERT POWER AND ANOTHER - *Respondents.\**

THIS was a petition, by *Webster* and others, for leave to appeal from decrees of the Supreme Court, in its equitable jurisdiction, and also from an order, revoking the leave given to appeal to the Queen in Council granted by that Court.

It appeared from the petition, that a suit was instituted by the Petitioners in the Supreme Court of *Victoria*, and a decree made by that court against the Petitioners, which decree was afterwards confirmed by the Supreme Court in its appellate jurisdiction, and that the Petitioners obtained, on the 13th of *June*, 1865, leave to appeal therefrom to Her Majesty in

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By an order of the Supreme Court of *Victoria* leave to appeal to Her Majesty in Council, pursuant to the Colonial Act, 15th *Vict.* c.10, was allowed, on condition of the Appellants giving security within three months for costs of appeal. The Appellants at first offered to deposit money to the

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, and Sir Edward Vaughan Williams.

amount of the security required, but afterwards a security Bond was approved by the Master of the Court, and, without objection by the Defendants, filed as of record; but in consequence of objections afterwards taken by the Defendants' solicitors to the competency of the proposed sureties, the Bond was not filed within three months. Upon a motion by the Defendants to set aside the leave to appeal upon that ground, the Supreme Court made an order revoking the leave given.

In such circumstances their Lordships, upon petition, gave special leave to appeal on security being given for costs in *England*, with liberty for the Petitioners to apply to the Court at *Victoria* to cancel the security Bond.

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council under the Colonial Act, 15th Vict., No. 10, "For the better administration of Justice in New South Wales." That in accordance with the provisions of that Act the leave to appeal was granted upon condition, that the Petitioners gave security by bond in the sum of £250, to the satisfaction of the Master in Equity, for the prosecution of the appeal and payment of the costs. That while the Petitioners' Solicitor was proceeding to carry out the order allowing leave to appeal, he was on the 6th of October, 1866, served by the Defendants' Solicitors with a notice of motion that the Court would be moved, on the 12th of October, instant, that the Order made on the 13th of June last be set aside and rescinded, on the ground that the Petitioners had not given the security required by such Order within three months, the time limited by the 15th Vict., No. 10, from the date thereof, and upon the allegation that the appeal was not more forward then than at the date of the order allowing it, excepting that the Master had settled the form of the Bond in blank for the names of the proposed sureties, and had directed the completion by the 2nd of October, but that the Petitioners had not complied with such directions. It further appeared from an affidavit filed by the Petitioners' Solicitor, that the delay in perfecting the securities had mainly arisen from the objections made by the Defendants' Solicitor to the sureties proposed. That an offer had been made by the Petitioners, and in the first instance accepted by the Defendants' Solicitors, for a deposit of the sum of £250 in Court, which consent was afterwards withdrawn, and that all the Petitioners except one, were absent from the Colony, and their affairs managed by an Attorney, who had to obtain

the requisite sureties, which occasioned delay, but that on the 11th of *October*, 1865, the bondsmen had attended the Master's Office, and were approved, and the Bond passed and entered as of record. That, notwithstanding this fact, the motion to rescind the Order giving leave to appeal was heard by Mr. Justice *Molesworth*, and by an Order made on the 13th of *October*, 1866, the original Order for leave to appeal was revoked.

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The Petitioners submitted that, having regard to the above circumstances, the Order revoking the previous Order granting leave to appeal was erroneous. That the security directed to be entered into by the Order allowing leave to appeal having been entered into with the approval of the Master, was still in force, and they prayed for leave to appeal against the original decree, the decree of affirmance, and also from the Order revoking the Order for leave to appeal, offering to give such security for costs as might be directed.

The petition was heard *ex parte*.

Sir *Hugh Cairns*, Q.C., and Mr. *Edmund F. Moore*, appeared for the Petitioners.

Their Lordships granted leave to appeal, upon terms of the Petitioners lodging in the Council Office the sum of £300, as security for costs, and gave liberty to the Petitioners to apply to the Supreme Court at *Victoria* to cancel the Bond for security for costs of appeal, which had been already lodged there.

ON APPEAL FROM THE SUPREME COURT  
OF MAURITIUS.

EDOUARD SÉRENDAT - - Appellant.

AND

JEAN SAÏSSE - - Respondent.

15th Feb.  
1866.

By Art.  
1,384 of the  
*Code Civil*,  
(the law pre-  
vailing in  
*Mauritius*), it  
is provided  
that "*Les*  
*Maîtres et les*  
*Commettants*  
[*sont respon-*  
*sables*] *du*

*dommage causé par leurs domestiques et préposés dans les fonctions aux-  
quelles ils les ont employés :—*

*Held*, that in order to make the "*Commettant*" responsible for damage occasioned by the negligence of the "*Préposé*," it is necessary to establish that the "*Préposé*" was acting "*sous les ordres, sous la direction et la surveillance du Commettant*."

"*Préposé*," in Art. 1,384, means a person who stands in the same relation to the "*Commettant*," as "*Domestique*" does to "*Maître*"—namely, a person whom the "*Commettant*" has instructed to perform certain things on his behalf.

A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood at a job price, to be paid to their gangs. Through the negligence of the persons employed, the sparks of a fire kindled on A.'s land, set fire to and burnt down a house in the immediate neighbourhood belonging to B. It was proved in evidence that A. interfered with the work, and directed the Indians where to work :—

*Held*, affirming the judgment of the Supreme Court at *Mauritius*, that A. was the "*Commettant*" and the labourers "*Préposés*," within the meaning of the Art. 1,384 of the *Code Civil*, and that as the fire was occasioned by the men employed by A. he was responsible for their negligence, and liable to B. for the damage sustained by the fire.

THIS was an action brought by the Respondent against the Appellant to recover damages, by reason of the Respondent's house having been burnt down through the negligence of persons employed by the Appellant to clear his land of weeds and brushwood.

\* Present :—The Lord Justice Knight Bruce, the Lord Justice Turner, Sir James William Colvile, and Sir Edward Vaughan Williams.

The Appellant owned a plot of land in the district of *Plaines Wilhems*, in the Island of *Mauritius*. The Respondent was possessed of a dwelling-house opposite the Appellant's land. On the 17th of *October*, 1862, the Respondent's house was set on fire, and burnt to the ground, and damage was done to the trees surrounding it.

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The Respondent by his declaration alleged, that the Appellant employed divers persons, as his servants and agents, to clear his plot of land, and to cut down and burn the brushwood and thorn trees growing thereon, and well knowing how his servants and agents were employed, did not carefully look after and watch them while so employed; that his servants negligently and improperly lit a large fire on the Appellant's land, very near to the main road, and just opposite to the Respondent's house, and did not watch the same with due care, but allowed the fire to flame up in such a manner, that the sparks and burning particles of the fire were carried by the wind across the main road, and set fire to the house of the Respondent, whereby the house was burned to the ground, and all the trees which surrounded the house were so much injured that they had all since perished, and much furniture, moveable property, and jewellery, were injured, destroyed, and lost, and that the Respondent had suffered damages to the amount of 12,200 dollars.

The Appellant pleaded, first, that he was not guilty; secondly, that he did not employ any servant or agent to cut down the brushwood, &c., on the land as alleged, nor to burn the same or any other object on the land, nor did he give any order respecting the burning or destroying of any brushwood or straw, or

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anything whatever then being on the land; thirdly, that no fire was communicated from the land to the house of the Respondent, as alleged; and lastly, that the Respondent had not suffered damage to the amount in the declaration mentioned.

Issue was joined upon all these pleas.

On the 30th of *October*, 1863, the case came on for trial in the Supreme Court of *Mauritius*, before the Hon. *Charles Farquhar Shand*, Chief Judge, and the Hon. *Barthelemy Gustave Colin*, acting first Puis Judge.

The proceedings were commenced by the taking of the personal answers of the Appellant, who stated that he had employed job contractors to clear the plot of ground at a certain price; that on the part of the plot where the burning took place, were five small sapans trees; that he gave no orders that the trees should be burnt; that he was absent from the plot of ground during the whole of the morning of the day on which the fire occurred; that after the fire he had visited the plot of ground, and found that the sapans had been burnt, but were still standing; that the field where the fire took place was five-and-a-half feet below the road; that the sapans were about the same height, and that there was no brushwood, and not much grass or weeds on the spot; that there were no marks of fire between the sapans and a wall which separated the field from the road; that the wall had been whitewashed three days previously, but bore no trace or stain of smoke; that the wind on the morning of the day when Respondent's house was burnt did not set from the burnt spot upon the Appellant's land to the Respondent's house.

The Respondent called witnesses at the trial to

prove the allegation in his declaration that his house caught fire from sparks and burning particles, carried by the wind from the fire made in the Appellant's field to the Respondent's house.

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The Appellant also called witnesses to prove that he was not responsible for the acts of the labourers on his premises, by whose negligence the fire was alleged to have happened; that he was neither a "*Maître*" nor "*Commettant*" within the meaning of Art. 1,384 of the *Code Civil*, but was merely a *conductor operarum*, and that the job contractors were the parties, if any, who were liable, being, by Art. 1,793 of the *Code Civil*, responsible for the acts of the persons they employed. Both these job contractors, *Joondine* and *Beesapa*, who were Hindoos, and unacquainted with any other language than their own, were examined on their solemn affirmation. Their evidence, however, did not show a severance on the part of the Appellant from the control and superintendence of the work he had contracted with them to perform.

The Supreme Court, after reviewing the evidence, gave judgment on the 23rd of December, 1863, for the Respondent for the sum of 5,000 dollars for damages, with costs. The following was the material part of the judgment of the court, as set forth in the reasons transmitted by the Judges with the record:—  
"Art. 1,384 of the *Code Civil*, after enacting that every one is answerable for the damage caused by his own act, or by the act of those for whom he is responsible, proceeds to lay down that, '*les maîtres et les commettants*' are answerable, '*du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*' There must meet two conditions to throw upon the Master, or *Commettant*, the liability



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of the servant, or *Préposé's*, wrongful act. First, the wrong-doer must be a servant or *Préposé*. Secondly the act must have been done in the exercise of the duty, work, or charge, committed or entrusted to such persons. For instance, a workman hired by the defendant or by the job would not make the person for whom he works answerable for the wrong he may have done; the damage he may have caused whilst working on some other work, or for somebody else; but he would *prima facie* be answerable if the act done were directly connected with the actual work he had undertaken. In this case, the respective position of *Sérendat* and the Indian labourers seem to have been this. *Sérendat* hired them to do a certain work. Whether they were to be paid *per diem*, or to receive a round sum for the job, is not clearly proved, but is perfectly immaterial in law; they were not his regular domestic servants; they were to be paid to clear a certain piece of land from weeds and brushwood. The contract seems to have been entered into not with one Indian but apparently with the whole of them. One of the states they were all to have ten *annas* per day; another, that the job was done for seventy-five dollars to be divided between them. On either view, they were hired to do the work, and clearing the land was the work which they had to do; hence the damage done to the Defendant, if done through the negligence of the Indian labourers whilst clearing the ground would, we are perfectly satisfied, have been damage done by the act of '*Préposés*' in the exercise of their functions. The question of knowing whether an individual is the '*Préposé*' of another has often given rise, and may again, now that science and enterprise are progressing with such gigantic strides, give rise

to many important decisions. It seems, however, well settled, that if a person hires a hackney coach from a livery-stable keeper, who seats his own coachman on the box, and, if an accident happen, the livery-stable keeper is answerable and not the hirer of the vehicle, for the coachman is the *Préposé* of the livery-stable keeper. It is also held that if a householder employs a builder, and by the negligence of that workman an accident happens, the householder is answerable, for the workman is his *Préposé*. Whether the doctrine can be carried further, and be extended so as to make the first employer not only answerable for the negligence of his immediate *præpositus*, but also of those who are appointed by that *præpositus* to act under him, or with him, is a *vexata quæstio*, on which are to be found many conflicting authorities. But the true theory seems to us to be this,—to create the reciprocal rights and liabilities of *Commettants* and *Préposés*, and the consequences arising therefrom, it is necessary that the one—i.e., the '*Commettant*'—should have chosen the other—i.e., the '*Préposé*'—and that the former should have the power to give the latter orders and instructions relative to the business or work confided to him; and if, in the discharge of such business or execution of such work, the '*Préposé*' is guilty of negligence, whereby a third party suffers, then the '*Commettant*' is *civîliter* answerable, for he has to impute to himself the blame of having given orders without providing that they be duly executed, or of having chosen careless and negligent agents. And this is the case, whether the agents be domestic servants or be connected with the principals by the contract known as *locatio operarum*. In fact, most of the authorities,

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and we think justly so, which govern cases of the description, arise out of contracts of that nature. *Vide Toullier*, 11, No. 284; *Doublet, Caps. Dall.*, p. 175; *Reygasse v. Plago*, C. C., 28 June, 1858; *Dalloz*, 39, p. 426. The Roman law, which has applied the same principles to particular cases without generalizing them, likewise made a person answerable who had chosen an inexperienced or imprudent agent. '*Non est facile*,' says the law, 1 D. Lib. XLVIII., tit. iii., l. 14, '*tyroni custodia creditur: nam ea prodita, is culpæ reus est, qui eam ei committit*.' And again, we read in the *Inst.*, Lib. IV., tit. v., pl. 1, on *Quasi delicto*: '*Cum enim neque ex contractu adversus eum constituta hæc actio, et aliquatenus, is reus est, quod opera malorum hominum uteretur, quasi ex maleficio teneri videtur*.' Art. 1,384 of the code has generalized those principles, well known however, and acted upon in *France* previous to its promulgation; and we think, without entering into the question whether the Master's liability can be further extended, that the above are the conditions required to make such Master liable for the *quasi delictum* of his immediate *Préposé*. A judgment of Mr. Baron *Wilde*, in *England*, has been quoted in support of the Defendant's views. The law of *England* has certainly a good deal of similarity with our own on cases of this nature; the starting point is the same, but it seems to us that the case cited, *Hole v. Sittingbourne and Sheerness Railway Co. (a)*, is very far from supporting the view that the rule which applies to masters and servants does not find its application where the contract is one of *locatio operarum*, even

(a) 6 H. & N. 488.

supposing that the contract between a master and servant be not a *locatio conductio operarum*. That case was stated by the Lord Chief Baron to fall immediately within the opinion of Lord *Campbell* and the rest of the Court in *Ellis v. The Sheffield Gas Consumers' Co.* (a); and there the proposition, that in no case could a man be responsible for the act of a person with whom he has made a contract, was held to be absolutely untenable. Here it is not at all clear to us that the contract was with *Joondine* alone; the evidence leads us rather to believe that the contract was directly with all the Indians; and if so, the mischief complained of would have been done, not by the contractors' workmen, but by the contractors themselves; but there is more—*Joondine*, supposing him to be the sole contractor, distinctly states that he himself set fire to the brushwood: on either hypothesis, therefore, the contractor alone would have done the wrong. Now was this burning of the brushwood part of the work which *Joondine* and the other Indians were employed to do? We have no doubt it was, for it is in evidence that for some days previously the same operation of burning weeds and grass, so as to facilitate the clearing of the land, had been carried on; the Defendant knew it, and suffered it to be done; he did not check a mode of proceeding which, perfectly harmless, no doubt, when properly attended to and watched, might become dangerous if left at the mercy of a set of idle, careless, semi-barbarians. The Defendant may have a right of action, illusory, no doubt, against those Indians, but it is no answer to the Plaintiff to say, that the Defendant employed

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(a) 2 E. & B. 767.

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those men to do his work properly, and that they did not do so; and if the rule of law be binding upon the householder who employs a Builder, an Architect, men on whose skill and prudence he may *à priori* rely, assuredly it must be binding, and for reasons still more cogent, upon the proprietor who employs ignorant and careless day labourers. On the facts of this case, therefore, we have no doubt that if it is proved that the Plaintiff's house was burnt down, or through the negligence of the Indians employed by the Defendant to clear his ground, the Defendant is in law liable to make good the damage proved to have thereby been suffered by the Plaintiff. Another point of considerable importance in law arises here—On whom does the *onus* lie to prove that the fire arose from the negligence and want of care of the *Préposé*? In questions between landlord and tenant the Articles 1,733 and 1,734 of the *Code Civil* show very clearly that the tenant's negligence is presumed; he must answer for the consequences of a fire, unless he prove certain facts pointed out in the Articles; it is for him to prove he is in possession of the premises he holds on lease; but this is a very special law, like all those which militate against the equitable principle on which justice rests, that the Plaintiff must make out his case; and accordingly it is *strictissimi juris*, and cannot be extended to cases not included in the special enactment which created it. It has, therefore, been held that the legal presumption which prevails in cases of fire as between landlord and tenant, does not in cases of a similar nature between neighbour and neighbour. Almost every decision of the Courts of *France*, and certainly the opinion of the ablest commentators of the *Code*, agree in that doctrine, and

chiefly on the ground mentioned above, that the exception to the general principle was not contemplated by the law to extend beyond the case that has been provided for; *vide, inter alia, Merlin, Rep. verb. 'Incendie,'* § 2, Nos. 9 and 10. We are, therefore, of opinion, that the Plaintiff is bound to prove the fact that it is owing to the negligence of the Defendant or his *Préposés* that the fire was communicated from the Defendant's field to his house. This part of the case is certainly less free from difficulty than the legal points that have been examined and disposed of above." The Court then proceeded to examine the evidence, and after going through the evidence said: "On the whole we have come to the conclusion, that the fire which destroyed the Plaintiff's house was communicated to it from the Defendant's field, and this was due to the negligence of the Indians employed by the Defendant to clear his ground. As to the question of damages, it often is the case, and we think in this cause it is the case, that much heavier damages are asked than, judging from the evidence, a Court of Justice is warranted to give. We think that in awarding £1,000, damages, with costs, we shall meet the justice of the case."

The Appellant afterwards presented a petition to the Supreme Court for leave to appeal to Her Majesty in Council against this judgment, and leave to appeal was granted by the Supreme Court.

After the judgment of the Supreme Court, the Appellant brought forward additional evidence upon affidavit, to show that the fire by which the Respondent's house was burnt down was caused by the Respondent's own servants; and further, that the Appellant's Attorney was taken by surprise at the

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trial with regard to the evidence adduced by the Respondent, which tended to show that the fire on the Appellant's land had been resuscitated or fed, between eight o'clock in the morning and the time when the fire broke out in the Respondent's house, and that had he been aware that such evidence would be produced, he could have called evidence to prove the contrary.

On the 9th of *February*, 1864, the Appellant moved for a new trial, on the ground of material evidence, set forth in the above affidavit, having been obtained since the judgment of the 23rd of *December*, 1863, and on the ground of surprise; but the Court, upon reading the affidavits on both sides, refused the motion with costs.

The Appellant then presented a petition to the Supreme Court, praying for leave to appeal against the judgment of the 9th of *February*, 1864, where the Court, upon the 29th of *March*, 1864, refused, holding that in point of form the effect on the merits of the case would carry all subsidiary proceedings, and that it was useless to multiply appeals.

The present appeal was brought against the judgment of the Supreme Court of the 23rd of *December*, 1863, and also against the Order of the Court made on the 9th of *February*, 1864, whereby the motion for a new trial was dismissed with costs.

Mr. *Bovill*, Q.C., and Mr. *Charles E. Pollock*, for the Appellant :—

It may be assumed that the Respondent's house was destroyed by the sparks from the fire on the Appellant's land, but that alone does not make the Appellant liable. He is not responsible for the act

of the job contractors employed by him, or for the negligence of their servants. The *Code Civil* is the law in force in *Mauritius*, and the parties must be governed by its provisions. No doubt by that *Code*, as by the English law, a Master is liable for the negligence of a servant in his employ. Art. 1,384 provides, that "*Les maîtres et les commettants*" are responsible for the damage "*causé par leurs domestiques et Préposés dans les fonctions auxquelles ils les ont employés*," but to make the Appellant liable for the negligence it must be shown that the *Préposé* acted "*sous les ordres, sous la direction, et sous la surveillance du Commettant*," *Dalloz, Jur. Gen. verbo "Responsabilité."* To make the Appellant responsible for the damage, that position must be established by the Respondent, who here charges the negligence, and on whom the *onus probandi* lies. Now, there is no proof of any act of negligence on the part of the Appellant. The negligence, if any, was that of the contractors, or those employed by them on the job. The Appellant had parted with all control and superintendence over the work and over the contractors, by whom the clearing of the land was to be performed. The question, therefore, turns upon this point, did the Appellant stand in the relation of "*Commettant*" and the Indians "*Préposés*," within the meaning of Art. 1,384 of the *Code Civil*? The relative position of the parties was not properly understood by the Court below. The term "*Commettant*" properly translated means "Employer," and "*Préposé*" "Foreman or overseer," and the French authorities establish this definition: *Sirey, Comms. by Gilbert*, note 32 (Ed. 1855). Here the contractors were paid a fixed sum to do certain work, and were

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the sole masters of the work, and the employer is, therefore, not responsible for the negligence of the contractors. This is illustrated by the following cases in the *Cour de Cassation*, referred to in *Dalloz Jurisprudence Général*, pp. 372-3 :—*Teston v. Société and the Mining Company of the Grand Condo Northern Railway of France v. Boisseau*; *Administration of Forests v. Martin*, *Dalloz Jur. Gén.* Part I. p. 49, 1860, where a fire was caused in a forest by the negligence of a Woodman, and he alone was held liable. So in the case of a fire from the negligence of a Cooper employed in a public warehouse: *Dalloz Jur. Gén. Tom. xxx. verbo "Hiring,"* ch. 3, sec. p. 415. The labourers here do not answer the description given by *Sirey, Codes Annotés, Tom. I. p. 665*, as "*Ouvriers*."

The English law, in respect to the liability of a Master for acts of his servants, is analogous to Art. 1,384 of the *Code Civil*. The rule is laid down in *Addison's Treatise on Torts*, pp. 340-1 (2nd Ed.) that the party himself, who actually inflicts the injury through his own negligence, is responsible for the injurious consequences of his default. A person contracting with another for the performance of certain work, the work being proper to be done, and the contractor a proper person to do it, the employer is not liable for injuries caused by the negligence of the contractor. In *Butler v. Hunter (a)*, it was determined that an employer is irresponsible for acts of his agent, whether contractor or otherwise, exercising an independent employment, provided the party was selected as being reasonably fit for such a position.

(a) 7 H. & N. 826.

*Reedie v. The London and North Western Railway Company* (a); *Hole v. The Sittingbourne and Sheerness Railway* (b). Where a party comes to his particular *situs* by reason of the employment, the employer is only responsible if he could have abated the injury or nuisance between the wrongful act commenced and the damage resultant therefrom, *Gandy v. Jubber* (c). If a Contractor selects workmen the employer is not liable: *Peachey v. Rowlands* (d); *Overton v. Freeman* (e); *Knight v. Fox* (f); *Steel v. South-Eastern Railway Company* (g); and it makes no difference if the labourer employed is paid by the job; *Sadler v. Henlock* (h). We submit, moreover, that the weight of evidence was against the finding of the Court below, that the fire took place through negligence of the contractors, and that, therefore, there ought to be a new trial. We do not question the Order of the Court made on the motion for a new trial, and abandon that part of the appeal.

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Mr. *Anderson*, Q.C., and Mr. *F. Philbrick*, for the Respondent:—

In point of law the Appellant, as held by the Court below, is responsible for the negligence of his servants in the course of their employment by him: *Code Civil*, Art. 1,384. The Appellant must be considered as the “*Commettant*” or Master of the Indians employed by him to clear his land of the weeds and brushwood, and they, as his “*Préposés*” or servants, the proper received definition of those terms: *Toullier, vo.*

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| (a) 4 Ex. Rep. 244.       | (b) 6 H. & N. 488.     |
| (c) 39 L. J. (Q. B.) 151. | (d) 13 C. B. Rep. 182. |
| (e) 11 C. B. Rep. 867.    | (f) 5 Ex. Rep. 721.    |
| (g) 16 C. B. Rep. 550.    | (h) 4 E. & B. 570.     |

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"*Commettans*" *Table Général*; and he was liable for the damage caused by their acts in discharge of the duties of their employment. The evidence shows that the Appellant had not parted with the control of the works; he superintended the men, and ordered them where to work. This fact distinguishes the cases cited from *Dalloz*, relied upon by the Appellant, which were cases of contract. It is said that the *Code Civil* is the same as the English Law. It may be so, but that *Code* is certainly more comprehensive. The *Code Civil* is precise. Art. 1,384 enacts, in terms, that every person shall be answerable for the damage caused by the act of those for whom he is responsible. "*Les Maîtres et Commettants*" are declared to be responsible for damage caused by their "*domestiques préposés dans les fonctions auxquelles ils les ont employés*." Here the Appellant was the Master, or "*Commettant*" of the Indians employed by him to clear his ground, and they were his servants, or "*Préposés*."

In the Court below it was contended by the Appellant that his position was merely that of hirer of the services of these Indian labourers as *conductores operarum*; that in fact they were independent contractors, and that neither could he be a "*Commettant*" nor these men "*Préposés*," within the meaning of Art. 1,384 of the *Code*; but our contention is, that the Appellant was Master of these men, and as such the "*Commettant*," and they, therefore, were his "*Préposés*." Even assuming the contract to be a *locatio operarum*, the Appellant is still liable for the consequences of the negligent acts of his contractor. He selected and paid the Indians; whether they were paid by the piece or by daily wages is immaterial, and their relationship toward their employer is not

affected thereby; indeed the Appellant personally superintended and directed the men when present. The liability imposed by the *Code* is not confined to servants, "*Domestiques*," but extends to *Préposés*, namely, to those who are put forward by the employer and entrusted by him to do some particular work or to fulfil some particular function (*præpositi*), although they may not be "*Domestiques*." Now, the two Indians were admittedly selected and engaged by the Appellant to clear his ground. They were his "*Préposés*" for the execution of that work, and if in the execution of that work they used fires to burn the rubbish and weeds, as it is clear they did with the knowledge and sanction of the Appellant, he is liable, both on authority and principle, for the damage occasioned by such act. It is so by the English law. Thus in *Turberville v. Stampe* (a), the Defendant's servant had lighted a fire in his master's field in the due course of husbandry, but so negligently kept it that it extended to the Plaintiff's heath and consumed it, and the Court held that the Defendant was liable; and that case has been followed by *Filliter v. Phippard* (b); *Vaughan v. Menlove* (c); *Blaikie v. Steinbridge* (d); *Randleson v. Murray* (e); *Dalyell v. Tyrer* (f); *Pigott v. Eastern Counties Railway Co.* (g). The same liability exists by the Civil law: *Domat*, C. L., B. II., sec. iv., p. 4 & 6; and the same principle was acted on by this Tribunal in the Canadian cases: *The Quebec Fire Assurance Company v. St. Louis* (h); *The Great Western Co. of Canada v.*

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| (a) <i>Ld. Ray.</i> 264.    | (b) 11 Q. B. Rep. 347.          |
| (c) 3 Bing. (N. C.) 468.    | (d) 6 C. B. Rep. (N. S.) 894.   |
| (e) 8 A. & E. 109.          | (f) 5 Jur. (N. S.) 335.         |
| (g) 3 C. B. Rep. 229 & 240. | (h) 7 Moore's P. C. Cases, 286. |

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*Braid and Fawcett (a)*; and by the Courts in Scotland, in *Tennant v. The Earl of Glasgow (b)*; *Mackintosh v. Mackintosh (c)*; *Rankin v. Dixon (d)*; *Nicholson v. Dixon (e)*. The cases on this point are collected in *Smith* on "The Law of Reparation," p. 139. The case of *Reedie v. The London and North Western Railway Co. (f)*, relied on by the Appellant, does not apply for there the relationship of Master and Servant did not exist between the Defendants and the men who actually did the wrongful act. But taking the Appellant's case on the ground he puts it, as the negligent act directly arose in performance of the duty contracted for, the Appellant, as principal, would be personally liable. In *Hole v. Sittingbourne & Sheerness Railway Company (g)*, Baron Wilde says the loss there arose "from imperfectly doing the thing ordered to be done," and, therefore, as well by the principles of the Common law of England as by the terms of the Contract itself, the Appellant is responsible for the act of his *Préposés* in the negligent making or watching the iron on his land.

No fresh trial ought to be granted on the ground of new evidence having been found. The Court of Chancery refused leave to file a supplemental bill in the nature of a Bill of review, where, as in this case, the proper means of searching for the evidence had not been used previously to the original decree in *Bingham v. Dawson (h)*.

(a) 1 Moore's P. C. (N. S.) 101.

(b) 2 Court of Sess. Cas. 22 (3rd Ser.).

(c) 2 Court of Sess. Cas. 1357 (3rd Ser.).

(d) 9 B. M. & Y. 1048.

(e) 14 B. M. & Y. 973.

(f) 4 Ex. Rep. 244.

(g) 30 L. J. (Ex.) 81; 6 H. & N.

(h) Jac. 243.

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Judgment was delivered by

Sir EDWARD VAUGHAN WILLIAMS:

This was an appeal against a judgment of the Supreme Court of *Mauritius*, and also against an Order of that Court, whereby a motion made by the Appellant for a new trial of the cause in which the first-mentioned judgment was pronounced, was dismissed with costs.

On the argument before us, the latter branch of the appeal was, very properly in our opinion, abandoned by the Appellant's Counsel as hopeless.

The action was brought by the Respondent against the Appellant to recover damages for injuries sustained by the Respondent, by reason of his house and furniture having been destroyed through a fire kindled on the Appellant's land by labourers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made, that sparks and other burning particles were carried over and scattered upon the Respondent's premises, thus causing the fire which was the subject of complaint.

On the evidence adduced at the trial the Court below came to the conclusion, that the fire which destroyed the Plaintiff's house and furniture, was communicated to it from the fire kindled in the Appellant's field as alleged, and that this was owing to the negligence of the men employed by him to clear his ground. And we think the Court was fully justified by the evidence in coming to this conclusion.

The only question, therefore, which remains is, whether the Appellant was responsible for the negligence of the men so employed by him.

The Respondent grounded his claim on the Art.

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1,384 of the *Code Napoléon* (which is the prevailing law of *Mauritius*), and which is in these words:—  
*“Les maîtres et commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.”*

The Respondent contended that the Appellant as the men he employed stood in the relation of *Commettant* and *Préposé* within the meaning of the Article. It is necessary, therefore, to ascertain what is the meaning of the word “*Préposé*.” It appears from *Napoléon Landais’s* Dictionary that the meaning of the word “*Préposé*” is “*qui est commis à quelque chose, qui en a la garde, le soin ;*” and in the same Book the meaning ascribed to the verb “*préposer*” is “*commettre, établir quelqu’un avec pouvoir de faire quelque chose ou d’en prendre soin.*” And accordingly we think that, subject to the qualification hereafter to be mentioned, the word “*Préposé*” in the Article means substantially a person who stands in the same relation to “*Commettant*” as “*Domestique*” does to “*Maître*,” i.e., a person whom the “*Commettant*” has entrusted to perform certain things on his behalf. This construction of the word appears to be supported by a passage in *Dalloz’ Rép. Tom. xxxi* p. 440, No. 689, where he says, “*Les domestiques sont une classe particulière de préposés.*”

The French lawyers, however, in their interpretation of the Article, have qualified the above construction by the doctrine, that in order to make the *Commettant* responsible for the negligence of the *Préposé*, the latter must be acting “*sous les ordres et sous la direction et la surveillance du Commettant.*” This doctrine is certainly supported by the French authorities to which we were referred by the Council.

for the Appellant, viz.—*Dallos' Répertoire*, tit. “*Responsabilité*,” ch. iii., sect. 2, article 5, and the three cases of *Teston v. Salles and the Mining Company of the Grand Combe*; and *The Northern Railway of France v. Boisseau*; and *Administration of Forests v. Martin*; which were decided by the *Cour de Cassation*, and are cited in *Dallos' “Jurisprudence Générale,”* copies of which were supplied to us by Counsel.

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Applying this doctrine to the present case, the Appellant's contention is, that the evidence shows he had parted with the control over the men he employed, and that they were not working under his orders, directions, and surveillance.

The evidence was, that the Appellant, in order to clear his ground of weeds and brushwood, employed two bands of Indian labourers, one of which was under an Indian named *Beesapa*, and the other band consisted of four men, who were under an Indian called *Joondine*, and included a man called *Bedhoo*, who appears to have been the author of the mischief, by setting fire to a heap of rubbish collected in the course of the work, so that the fire extended to some sapan trees. The object of setting fire to them was, as *Bedhoo* expressed it in his evidence, “to work more easily.” The work was to be paid for by the piece, *i.e.*, so much per acre. The evidence leaves it doubtful whether the Appellant was to pay the price to *Joondine* alone, or to him and the other Indians in his band; indeed, the Court below said the evidence rather led them to the conclusion that the contract was directly with all the Indians.

On this evidence it was contended on the behalf of the Appellant, that he is shown to have severed himself from the execution of the work, and parted with



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all superintendence and control over the persons by whom it was performed.

But we are of opinion that this is not a conclusion which is warranted by the evidence. Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the Appellant had parted with the power of directing, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not show that the general control, direction, and surveillance of the operations was relinquished by the Appellant by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by *Sirey* ("Cours Annotés," vol. i. p. 665), of "*ouvriers d'une profession reconnue et déterminée*;" they were ordinary labourers, characterized by the Court below as a "set of idle, careless semi-barbarians."

The view we have thus taken of the relation established by the agreement between them and their employer, is corroborated by the evidence, which shows that in point of fact the Appellant did interfere and control the men in the course of the work. For example, it was said by *Joondine*, "Mr. Sérendat told me not to put fire in the place where I was working;" . . . "he told me to put fire in another place which he pointed." Again, *Beesapa* says, "The previous day Mr. Sérendat had come and told *Joondine* to leave that portion of ground which is fifty

dollars, and go and work in the interior of the field." And the Appellant's answer states that he had given orders five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished.

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Looking, then, at the whole case, we are of opinion that the Appellant and the Indian whose negligence caused the fire stood in the relation of "*Commettant*" and "*Préposé*." And, as it has not been disputed that the negligent act was done by the "*Préposé*," in the course of his employment, it follows that the responsibility of the Appellant is made out.

It remains to be observed that the declaration in this case is not framed at all with reference to the Article of the Code, but charges in the ordinary form that the servants and agents employed by the Defendants were guilty of negligence. But we think that the words "servants and agents" must be read in a sense which will support the declaration, viz., servants and agents acting under the directions, orders, and surveillance of the Defendant.

For these reasons, their Lordships will humbly recommend to Her Majesty that the judgment of the Court below be affirmed with costs.

ON APPEAL FROM THE HIGH COURT  
ADMIRALTY.

ARTHUR BURTON PEASE and others - *Appellants*

AND

JEAN MARIE GLOAHEC - - - *Respondent*

THE "MARIE JOSEPH."

15th, 16th, &  
23rd June,  
1866.

A Bill of lading for the delivery of goods to order and assigns, is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them *in transitu*.

The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration, although the goods are not paid for; even if Bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide* and without notice.

A firm (*M. & D.*) in *France*, sold, through their agent in *England*, to *S. & T.* a lot of linseed cake, payable by Bill at three months' date and shipped the same. A Bill of lading, signed by the Master and indorsed by *M. & D.*, was delivered to *S. & T.* in exchange for their acceptance at three months' date. Afterwards the Bill of lading was redelivered to *M. & D.*'s agent to hold as security against the acceptance. *T.*, a member of the firm of *S. & T.*, subsequently obtained the Bill of lading from *M. & D.*'s agent, by fraudulent misrepresentation, and indorsed and delivered it to *P. & Co.* for value, without notice of the fraud. Before

IN this appeal the suit was instituted by the Appellants, the assignees of a Bill of lading of a cargo of linseed meal, against the ship "*Marie Joseph*," &

\* This appeal was twice argued. Present on the first hearing the 15th and 16th June, 1866:—The Lord Justice Knight Bruce, the Lord Justice Turner, and Sir Edward Vaughan Williams.

Present on the second hearing, the 23rd June, 1866, Lord Chelmsford (subsequently Lord Chancellor):—The Lord Justice Knight Bruce, the Lord Justice Turner, Sir John Taylor Coleridge, and Sir Edward Vaughan Williams.

also against the Respondent, the Master and owner of that vessel.

The facts were these :—

Messrs. *Maxwell & Dreossi*, of *Bordeaux*, in *France*, Merchants, by *Stericker*, their agent at *Hull*, in the month of *February*, 1864, agreed with Messrs. *Scarborough & Tadman*, of *Kingston-upon-Hull*, for the sale to them of sixty tons of linseed cake, *Scarborough & Tadman* to pay for the same by their acceptance at three months' date. The cake was shipped on board the "*Marie Joseph*," at *Bordeaux*, on the 11th of *February*, 1864, by *Maxwell & Dreossi*; and a Bill of lading, promising to deliver the same at *Hull* unto order of *Maxwell & Dreossi*, or to assigns, he or they paying freight for the same, was signed by the Respondent, and given by him to *Maxwell & Dreossi*. The Bill of lading was indorsed by *Maxwell & Dreossi*, and a Bill of Exchange for the purchase-money was drawn by them on *Scarborough & Tadman*, and *Maxwell & Dreossi* forwarded such Bill of lading and Bill of Exchange to *Stericker*.

On the 16th of *February*, 1864, *Stericker*, as agent of Messrs. *Maxwell & Dreossi*, took the Bill of Exchange, together with the Bill of lading and Policy of Insurance of the linseed cake, to the office

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the goods arrived in *England*, *S. & T.* became insolvent. Upon appeal, Held by the Judicial Committee (reversing the judgment of the Court of Admiralty) :—

First, that the firm of *S. & T.* acquired no new title to the goods by the fraud of *T.*, as it merely invested them with the temporary power of transferring their property in the goods; and,

Secondly, that the right of *M. & D.*, the vendors, to stop *in transitu* was gone, as the transfer to *P. & Co.*, was *bond fide*, and for a valuable consideration, in ignorance of *T.*'s fraud.

An ownership which was at the time perfect in law, though voidable as to part, namely, the possession, cannot in principal be treated differently from an ownership voidable as to the whole, but is in the interim protected by the interposition of a *bond fide* purchaser for valuable consideration.

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of *Scarborough & Tadman* at *Hull*, and the Bill of Exchange was then accepted by *Scarborough*, on behalf of his firm, and handed by him to *Stericker* in payment for the linseed cake, and *Stericker* thereupon delivered the Bill of lading, indorsed by Messrs *Maxwell & Dreossi*, and the Policy of Insurance of *Scarborough*.

After this had been done, it appeared that a conversation took place between *Stericker* and *Scarborough* respecting the affairs of a Mr. *Moore*, with whom the firm of *Scarborough & Tadman* had dealings, and whose affairs were considered to be in a doubtful position, and the result of that conversation was that *Stericker* requested *Scarborough* to let him (*Stericker*) have the Bill of lading, which *Scarborough* did, and the following memorandum was given and signed by *Stericker* for the same:—"Hull, 16th February, 1864. Memorandum that I have received of Messrs. *Scarborough & Tadman*, of *Hull*, a Bill of lading and Policy of Insurance for about sixty tons linseed cake shipped *ex 'Marie Joseph'*, dated at *Bordeaux*, the 11th of February, 1864, and which I hold as security against their acceptance of Messrs. *Maxwell & Dreossi's* draft for £427 1s. 4d., due on the 14th of May, 1864, until the cakes are sold or the vessel arrives."

On the 18th of February, 1864, *Tadman* went to *Stericker*, and stated that his firm had sold the linseed cake to a Mr. *Croysdale*, who would accept a Bill of Exchange against the Bill of lading which *Tadman* asked for, and which *Stericker* handed to him. The representation made by *Tadman* was untrue, as his firm had not sold the linseed cake at the time when the Bill of lading was so returned to him. On the same day that *Tadman* obtained the Bill of lading

but subsequently thereto, the Appellants, who were bankers at *Hull*, to whom *Scarborough & Tadman* were largely indebted, applied to them to reduce their debt.

*Tadman* then offered the Appellants, as security for their debt, the Bill of lading of the linseed cake, the Policy of Insurance effected thereon, and some warrants for some sacks of rib grass. The Appellant, *Pease*, on behalf of his firm, accepted the same, and *Tadman* then, on behalf of his firm, indorsed the Bill of lading to them, and delivered such Bill of lading, and also some warrants for some sacks of rib grass, as security for advances then made, or which might thereafter be made, by the Appellants to *Scarborough & Tadman*, with power to sell the linseed cake.

*Scarborough & Tadman* were at this time indebted to the Appellants in an amount exceeding the value of the linseed cake, but the Appellants were not aware that *Scarborough & Tadman* were then in insolvent circumstances. The Appellants, who had no notice or knowledge of the Bill of lading having been handed to *Stericker*, nor of the means by which it had been obtained back from him, retained possession of the Bill of lading, and advanced further moneys to Messrs. *Scarborough & Tadman*. On the 4th of *March*, *Moore* stopped payment, and on the 7th of that month *Scarborough & Tadman* also stopped payment. The Bill of Exchange for the price of the linseed cake was in circulation at this time, but in consequence of the stoppage of *Scarborough & Tadman* it was not paid.

On the 5th of *April* following, the "*Marie Joseph*" arrived at *Hull*, with the linseed cake on board. The Appellants claimed delivery of the linseed cake from

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the Master of the "*Marie Joseph*," and *Stericker*, who had in the interim received from *Maxwell & Drew* a Bill of lading indorsed to himself, claimed on the behalf the right to stop the same *in transitu*. Ultimately, the linseed cake was delivered by the Master of the "*Marie Joseph*" to *Stericker*.

The Appellants then instituted this suit against the "*Marie Joseph*," her tackle, apparel, and furniture, as the Respondent, her Master and owner, under the provisions of the 24th *Vict.*, c. 10, s. 6, for the recovery of damages in respect of the breaches of duty and of contract on the part of the Respondent in not having delivered the linseed cake to them.

The case was heard on the 1st and 2nd of August 1864, and on the 10th of November, 1864, the learned Judge, the Right Hon. Dr. *Lushington*, pronounced against the claim of the Appellants, on the ground that the Bill of lading having been obtained back from *Stericker* by *Tadman*, upon false representations and by fraud, it was negotiated without *Stericker's* consent, or the consent of the vendors of the linseed cake, and contrary to the understanding between *Scarborough* and *Stericker*; and that the fraudulent conduct of *Tadman* invalidated the indorsement of the Bill of lading to the Appellants though they become holders for valuable consideration, in ignorance of the fraudulent act of *Tadman*. The learned Judge, in support of this view, referred to the observation of Lord *Campbell* in *Gurney v. Behrend* (a), that it is not enough that the Plaintiff shew they become *bonâ fide* holders of the indorsed Bill of lading for valuable consideration.

(a) 3 El. & Bl. 633.

Mr. *Mellish*, Q.C., and Mr. *E. C. Clarkson*, for  
the Appellants.

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There being no dispute as to the facts, the question is narrowed to a single point of law, whether *Maxwell & Co.*, the shippers, had, under the circumstances, a right to stop *in transitu* the goods shipped by them to *Scarborough & Tadman*. The Court below was mistaken in thinking that this case was governed by *Gurney v. Behrend (a)*. \* The facts are essentially different. There it was laid down by Lord *Campbell* that *prima facie*, the Defendants had a right to stop certain wheat, the subject of the action, as it was still *in transitu*, the vendors being unpaid, and that G., with whom the Bill of lading had been pledged by a third party, for valuable consideration, was not entitled to the cargo, unless the party pledging the Bill had not merely possession of the Bill, but the right to transfer it. Here the facts are widely different. The Bill of lading, indorsed by the vendors, was, by their authority, and with their intention of transferring the property therein to a purchaser, delivered by *Stericker*, their agent. It is true the Bill of lading was subsequently returned to *Stericker*, yet, when handed back by *Scarborough & Co.* to *Stericker*, he was acting within the authority originally conferred upon him by his principals, and, from the first, intended to deal with their right in the Bill of lading. The Appellants were *bonâ fide* holders of the Bill of lading for valuable consideration, without notice of fraud. The transfer to them was valid, and the Appellants, therefore, entitled to the goods.

(a) 3 El. & Bl. 622.



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The learned Judge, in the Court below, did not distinguish between obtaining goods by fraud, or obtaining them without authority; or that a transfer of property obtained by fraud is voidable only and not void. If a contract of sale be obtained by fraud on the part of the purchaser, it may be voidable at law upon the authority of *Gurney v. Behrend* (a), but it is not absolutely void as against a purchaser for value. It is void only at the election of the vendor, and it is too late to declare such election after the goods have passed into the hands of a *bona fide* purchaser without notice: *White v. Garden* (b); *Parker v. Paton* (c); *Kingsford v. Merry* (d); *Stevenson v. Newman* (e), where all the cases are collected. *Barrow v. Coles* (f); *Patten v. Thompson* (g); *In the matter of Westzinthus* (h); *Dyer v. Pearson* (i). [Lord CHELMSFORD:—Messrs. Scarborough & Tadman having parted with the Bill of lading, could not recover it in trover.] No. Although there may not be any direct decision to be found which is on all fours with the present case, yet the principle which we rely upon is to be deducted from those authorities. Our proposition is, that, admitting the right to stop *in transitu*, in case of the vendee's insolvency, yet that that right may be defeated by indorsing and delivering the Bill of lading to a *bona fide* indorsee for a valuable consideration, without notice of fraud: *Lickbarrow v. Mason* (k). Again,

- (a) 3 El. & Bl. 633.  
 (c) 5 T. R. 175.  
 (e) 3 Camp. 92.  
 (g) 5 M. & S. 350.  
 (i) 3 B. & C. 88.

- (b) 10 C. B. 919.  
 (d) 11 Ex. 577; S. C. 1 H. & N. 508.  
 (f) 13 C. B. 285, 302.  
 (h) 5 B. & A. 817.  
 (k) 2 T. R. 63, and see Smith's  
 Leading Cases, note 431. [Ed. 1841.]

the Appellants are entitled by Statute, 5 & 6 *Vict.*, c. 39, s. 1, to the Bill of lading.

Dr. *Deane*, Q.C., and Dr. *Swabey*, for the Respondent.

Possession of the Bill of lading having been obtained from the vendors' agent, by the fraudulent representations of *Tadman*, the transfer by him to the Appellants, by indorsement and delivery of the Bill of lading, conveyed no title to the goods, as the transfer was tainted with fraud. There is a great distinction between *Kingsford v. Merry* (a), *White v. Garden* (b), and other cases of that class cited by the Appellants, and the present case. It makes no difference that *Tadman* once had, with his partner *Scarborough*, a property in the Bill of lading, for it was handed back by them to the vendors' agent, from whom it was obtained by fraud. *Newsom v. Thornton* (c) is a strong case in support of this position. There it was held that a factor could not pledge the goods of his principal by indorsement and delivery of the Bill of lading any more than by the delivery of the goods themselves, though an indorsee knew not that he was factor; and though the goods were consigned on the joint account of the consignors and consignee, and a Bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed and delivered it to the Defendants, upon conditions of their making an advance to him on it, which they failed to do, but claimed to regain it as security for prior advances; and it was

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(a) 11 Ex. 577; S. C. 1 H. & N. 503. (b) 10 C. B. 919.

(c) 6 East, 17.

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determined that such indorsement and delivery of the Bill of lading did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them; and the ruling is approved of in *Blackburn on Contract Sale*, p. 291: *Cuming v. Brown (a)*. In *Spalding v. Ruding (b)*, Lord Langdale held, that in equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, did not destroy the consignor's right of stoppage *in transitu*, *ultra* the particular lien of the transferee.

Mr. E. C. Clarkson, in reply:—

*Kingsford v. Merry (c)* is a good authority at law and applies to this case. There it was laid down by the Exchequer Court that, although a vendee has made a false representation in order to effect the contract or obtain possession of a chattel, yet the property vests in the vendee, and, if he has transferred the interest in the chattel to an innocent transferee, it is good against the vendor. It is true that this decision was reversed by the Exchequer Chamber, yet it was upon grounds which do not affect the principle thus enunciated. It is similar to the case of an equitable mortgage by deposit of deeds. If the mortgagor obtain possession of the deeds and convey the estate, it would give a good title to a purchaser. *Newsom v. Thornton (e)*, relied upon by the Respondent, is not in point. In that case, although the Bill of lading was indorsed, and delivered by the consignee to parties on condition of their making an advance to

(a) 9 East, 505.

(b) 6 Beav. 376.

(c) 11 Ex. 577.

(d) 1 H. & N. 503.

(e) 6 East, 17.

him on it, which they failed to do, but claimed to regain it as a security for prior advances ; in such circumstances, it was properly held that it did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them.

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The case stood over for consideration. Their Lordships' judgment was now pronounced by

The LORD CHANCELLOR (who, after stating the nature of the appeal, proceeded) :—

4th Aug.  
1866.

The question raised by the suit is the right of the shippers of the linseed cake to stop the same *in transitu*, under the following circumstances.

In *February*, 1864, Messrs. *Maxwell & Dreossi*, of *Bordeaux*, through their agent, *Walter Stericker*, sold to Messrs. *Scarborough & Tadman*, of *Hull*, sixty tons of linseed cake at £7 12s. 6d. per ton, payable by Bill at three months from the date of the Bill of lading. On the 11th of *February* the goods were shipped on board the "*Marie Joseph*," at *Bordeaux*, by *Maxwell & Dreossi*, and a Bill of lading for the same was signed by the Respondent, the Master. *Maxwell & Dreossi* indorsed the Bill of lading to order and assigns, and drew a Bill of Exchange for the price on Messrs. *Scarborough & Tadman*, and sent the Bill of lading and Bill of Exchange to their agent, *Stericker*. On the 16th of *February*, *Stericker* took the Bill of lading and the Bill of Exchange to *Scarborough & Tadman*, when the Bill was accepted by *Scarborough*, and *Stericker* thereupon indorsed the Bill of lading, and delivered it to *Scarborough*, together with a Policy of Insurance which had been effected upon the goods.

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A conversation then ensued between *Stericker* and *Scarborough* respecting the dealings of *Scarborough* & *Tadman* with a person named *Moore*, whose circumstances were supposed to be embarrassed, and *Stericker* asked *Scarborough* whether he had any objection to his holding the Bill of lading. *Scarborough* told *Stericker* to take it, and delivered back the Bill of lading to *Stericker*, who thereupon signed the memorandum of the 16th of *February*, 1864 [*ante* p. 55].

On the 18th of *February*, *Tadman*, the other partner in the firm of *Scarborough* & *Tadman*, called upon *Stericker*, and stated to him that his firm had sold the linseed cake to a Mr. *Croysdale*, who would accept a draft against the Bill of lading. The linseed cake had not been sold to *Croysdale*, nor to any other person. Trusting to this misrepresentation, *Stericker* returned the Bill of lading and the Policy of Insurance to *Tadman*. On the same day, after the obtaining the Bill of lading, in consequence of a message received from the Appellants, Messrs. *Pease* & Co., Bankers in *Hull*, to whom *Scarborough* & *Tadman* were largely indebted, *Tadman* went to the Bank, and Mr. *Pease* called his attention to the state of his account and to the amount of the Bills under discount, and asked him for security. *Tadman* thereupon indorsed the Bill of lading in the name of his firm, and delivered it, together with the Policy of Insurance, to Mr. *Pease*, and gave Messrs. *Pease* & Co. an unsigned memorandum, authorizing them to sell the linseed cake, and to place the proceeds to the credit of *Scarborough* & *Tadman*, on account. *Moore*, in whose transactions *Scarborough* & *Tadman* were supposed to be involved, became bankrupt on the 4th of *March*; and on the 7th of *March*, *Scarborough*

*Tadman* stopped payment. On the 5th of *March* telegram was received from *Maxwell & Dreossi* to *Stericker*, directing him to stop the delivery of the linseed cake, and on the 7th of *March* he received from *Maxwell & Dreossi* a Bill of lading indorsed to himself. The "*Marie Joseph*" arrived at *Hull* on the 5th of *April*. The linseed cake was demanded on behalf of the Appellants upon the Bill of lading indorsed to them, but *Stericker* afterwards went on board and presented his Bill of lading, and obtained possession of the goods under an indemnity from *Maxwell & Dreossi* to the Respondent.

Upon these facts the learned Judge of the Court of Admiralty was of opinion that the Bill of lading having been obtained from *Stericker* by the false representations and fraud of *Tadman*, and having afterwards been negotiated without the consent of *Stericker*, or of his principals, and contrary to the understanding between *Stericker* and *Tadman*, the fraudulent conduct of *Tadman* invalidated the indorsement to *Pease & Co.*, and he accordingly pronounced against them.

The question is one of nicety and difficulty, and, as was stated by the Counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right determination. A Bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration,

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although the goods are not paid for, or Bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide*, and without notice. Although a Bill of lading is a negotiable instrument, it is only a symbol of the goods named in it, and, as was said by Lord Campbell in *Gurney v. Behrend* (a), "although the shipper may have indorsed in blank a Bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority; and if it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." This *dictum* is very carefully confined in its terms to the original transfer of a Bill of lading deliverable to the assigns of the shipper. In the cases which it supposes, there could be no lawful assigns of the shipper, and consequently the Bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods, having obtained a Bill of lading, indorsed it to order and assigns, and forwarded it to *Stericker* for the express purpose of its being indorsed by him, and handed over to *Scarborough & Tadman*. By the indorsement and delivery to *Scarborough & Tadman*, they acquired the complete property in the goods and control over the Bill of lading subject only to the right of *Maxwell & Dreossi* to stop *in transitu* as long as it remained in their hands. This is not denied by the Respondent; but his case is, that *Scarborough & Tadman* having, after the indorsement and delivery of the Bill of lading, returned

(a) 3 El. & Bl. 694.

to *Stericker* to retain as a security for the payment of the Bill of Exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to *Pease & Co.*, at least without being subject to the lien created by the deposit with *Stericker*, and consequently that the right to stop *in transitu* against *Pease & Co.*, though *bond fide* indorsees for valuable consideration still subsisted.

There can be no doubt that, although the vendors had parted with the property in the Bill of lading by the indorsement to *Scarborough & Tadman*, they acquired a title to hold it by the terms of the agreement under which it was deposited with *Stericker*. These terms do not include any stipulation that the vendees should not so deal with the Bill of lading as would, in the event of their insolvency, defeat the right to stop *in transitu*.

It is not even stipulated that the vendors should hold the Bill of lading till the sub-vendees should give them a Bill of Exchange or other security for payment. The Bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods.

*Scarborough & Tadman* had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors, by keeping the Bill of lading in their hands, might have prevented *Scarborough & Tadman* from dealing with it. They chose to deliver it back to them, induced to do so, indeed, by the fraudulent representation of *Tadman*, but still consenting to

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their possession of it. The indorsees acquired no title from the vendors by the fraud which they practised, but merely obtained their own property by the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold a Bill of lading as a security. As in the case of lien, so in this case, as long as the Bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession, might have reclaimed and recovered it. But the moment it passed into the hands of *Pease & Co.*, to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. This is a much stronger case than that put by *Abbott, C.* in *Dyer v. Pearson* (a), of the real owner of goods who suffers another to have possession of his property and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the persons entitled to retain the possession of the instrument which represented the goods against the real owner relinquished the possession of it to them, and enabled them to deal with the property in their true character of owners. In the case of *Kingsford v. Merry* (b), it was held that, "When a vendee obtains possession of a chattel, with the intention, by the vendor, to transfer both the property and possession, although the vendee has committed a false and fraudulent mis-

(a) 3 B. & C. 42.

(b) 11 Ex. 577.

representation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

Although this case was reversed in the Exchequer Chamber (a), yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because, in the judgment of the Court, the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property.

An ownership, which was at the time perfect at law, though voidable as to part, viz., the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the interim protected by the interposition of a *bond fide* purchaser for valuable consideration.

For these reasons their Lordships will humbly recommend to Her Majesty that the decree appealed from be reversed, with costs.

(a) 1 H. & N. 503.

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dominions, it shall be lawful to the  
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gave rise to the Commission of  
Delegates, which was abolished by  
the 2nd & 3rd *Will. IV.*, c. 92,  
and for which the Judicial Com-  
mittee of the Privy Council is by

the 3rd & 4th Will. IV., c. 41, now substituted.

In a dispute in one of Her Majesty's Colonies, between two independent Prelates, which previous to the 25th Hen. VIII., c. 19, would have been referred to the Pope, Her Majesty has appellate jurisdiction, and can exercise the same by referring the matter under the 3rd & 4th Will. IV., c. 41, for the advice of the Judicial Committee of the Privy Council. [*In re The Lord Bishop of Natal*] - - - - - 115

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5. Sec. 23 of the 26th & 27th Vict., c. 24, which limits the time for appealing from the Vice-Admiralty Courts abroad to six months, vests, by the same section, a discretion in the Judicial Committee to admit an appeal, notwithstanding six months have elapsed.

Circumstances showing that there was no wilful laches in not lodging a petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting for a decision in a pending appeal, which involved a similar question, held sufficient for the exercise of the discretion vested in the Judicial Committee, to admit an appeal under that

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6. Several actions, in the nature of Petitions of Right, were brought against the Crown in *Victoria* under the Colonial Act, 28th Vict., No. 241, and judgments obtained against the Crown; but the Supreme Court of that Colony refused leave to appeal to *England*, in some cases, because the amount recovered was under £500, the appealable value prescribed by the Order in Council of the 9th of June, 1860, and in other cases, except upon terms of the Attorney-General in the Colony paying the amount of the verdicts with costs.

In giving leave to appeal, upon special petition for that purpose, the Judicial Committee refused to sanction the terms imposed by the Supreme Court on the Attorney-General of finding security for costs of the appeals, and admitted the appeals without security being given.

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7. By an Order of the Supreme Court of *Victoria* leave to appeal to Her Majesty in Council, pursuant to the Colonial Act, 15th Vict., c. 10, was allowed, on condition of the Appellants giving security within three months for costs of appeal. The Appellants at first offered to deposit money to the amount of the security re-

quired, but afterwards a security Bond was approved by the Master of the Court, and, without objection by the Defendants, filed as of record; but in consequence of objections afterwards taken by the Defendants' Solicitors to the competency of the proposed sureties, the Bond was not filed within three months. Upon a motion by the Defendants to set aside the leave to appeal upon that ground, the Supreme Court made an order revoking the leave given.

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The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration, although the goods are not paid for; even if Bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bona fide* and without notice.

A firm (*M. & D.*) in *France* sold through their agent in *England*, *S. & T.* a lot of linseed cake, payable by Bill at three months' date, and shipped the same. A Bill of lading, signed by the Master and indorsed by *M. & D.*, was delivered to *S. & T.* in exchange for their acceptance at three months' date. Afterwards the Bill of lading was re-delivered to *M. & D.*'s agent to hold as security against the acceptance. *T.*, a member of the firm of *S. & T.*, subsequently ob-

tained the Bill of lading from *M. & D.*'s agent, by fraudulent misrepresentation, and indorsed and delivered it to *P. & Co.* for the goods arrived in *England*, *S. & T.* became insolvent. Upon appeal, held by the Judicial Committee (reversing the judgment of the Court of Admiralty):—

First, that the firm of *S. & T.* acquired no new title to the goods by the fraud of *T.*, as it merely invested them with the temporary power of transferring their property in the goods; and,

Secondly, that the right of *M. & D.*, the vendors, to stop *in transitu* was gone, as the transfer to *P. & Co.* was *bond fide*, and for a valuable consideration, in ignorance of *T.*'s fraud. [*The Marie Joseph*] - 556

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1. As no Ecclesiastical Tribunal or jurisdiction is required in a Colony or Settlement where there is no Established Church, the Ecclesiastical law of *England* cannot be treated as part of the law which settlers carry with them from the mother country. [*In re the Lord Bishop of Natal*] - - - 115
2. The Colonial Act, establishing Municipal institutions in *New South Wales*, the 22nd *Vict.*, No. 13, sec. 1, declares that, "any City, Town, or Hamlet now or hereafter established, or any Rural District, may as thereafter pro-

vided, be constituted a Municipality." Section 2 provides, that upon petition, and after other proceedings have been taken, as therein described, the Governor may by Proclamation, declare such City, Town, or Hamlet, or such Rural District, to be a Municipality. A petition in pursuance of this Act by certain householders residing at four places, therein specified, proposing certain boundaries therein described, having been presented to the Governor, he by a Proclamation, reciting his powers under that Act, and the petition and other proceedings taken in pursuance thereof, declared a Rural District therein named to be a Municipality, to be divided into two wards, with certain limits and boundaries as therein defined. This Proclamation described the District incorporated in very different terms from those set out in the petition, for besides incorporating a Rural District with a Town, it included lands which the Petitioners had not asked to be included, and it omitted lands which the Petitioners had prayed to have included. Held, affirming the judgment of the Supreme Court, that this was fatal to the validity of the Proclamation, and that consequently the Municipality in question was not duly constituted or created in point of law. [*Graham v. Berry*] - - - 207

3. Construction of the *Victoria Colonial Acts*, 24th *Vict.*, No. 117, and

the 25th *Vict.*, No. 145, for regulating and amending the laws relating to the sale and occupation of Crown lands in the Colony. *C.* and *B.* having been in the occupation of certain waste lands as licensees paying an annual rent, obtained from the Governor a license in writing to occupy the same for one year and no longer, subject also to the reserved right of the Crown, to sell or proclaim any portion of such lands, as a gold-field common, without compensation for the loss of enjoyment to the licensee:—

Held, upon a sale being made by the Crown of a portion of such lands after proclamation, and the expiration of the tenancy for the year, that the Crown had, under the terms of the licenses, as also upon the construction of the Colonial Acts, an indefeasible title to such lands, notwithstanding the previous and subsequent occupation by the licensees, and payment of rent by them, which, under the circumstances, did not constitute a tenancy from year to year, or give the licensee any title to the lands in question. [*The Queen v. Dallimore*] - - - 347

4. *R.*, *F.* and *R.*, partners in business, and dealing with *F.*, *S.* & Co., took *T.* and *S.*, Clerks in their employment, into partnership with them. The partnership was constituted by deed to continue for three years, and a balance-sheet showing the liabilities and assets of the existing firm was

drawn up and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm—no distinction being made in their payments or balances, or between the debts or assets of the new, or what was the old firm. *F.*, *S.* & Co. continued to deal with the new as they had done with the old firm. *R.*, *F.* and *R.* having become insolvent, *F.*, *S.* & Co., creditors to a large amount, proved against the estate of the new firm. *R.* and *B.*, also creditors of the new firm, proved against their estate; and sought to expunge the proof of *F.*, *S.* & Co., on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, and not from the new firm:—

Held, by the Judicial Committee (affirming the judgment of the Supreme Court), that there was sufficient proof in the dealings and transactions of the several parties to show that the new firm, on its formation, adopted the liabilities of the old firm, and that *F.*, *S.* & Co. had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors.

The Act, 5th of *Vict.*, No. 17 (the principal Insolvent Act of the Colony of *Victoria*), sec. 39, enacts that, "any creditor who shall have or hold any security or lien upon any part of the insolvent estate,



shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition; and when he is not the petitioning creditor in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for the balance after such deduction."

Held, that this enactment does not destroy the distinction between the joint and separate estate of an Insolvent, so as to compel a creditor, holding a mortgage security on the separate estate, to estimate and deduct its value before he can be allowed to prove against the joint estate.

The English law of Bankruptcy, which allows a joint creditor, though holding a security on the separate estate, to prove against the joint estate without giving up his security, prevails in the Colony of Victoria, and is not altered or varied by the Insolvent Acts of that Colony. [*Rolph and the Bank of Australasia v. Flower*] - - 365

5. According to the law of *New Brunswick*, freehold lands of a debtor, if the personal estate is exhausted, may be sold under a *fi. fa.* [*Wickham v. The New Brunswick and Canada Railway Co.*] - - - - - 416

6. Leases granted by the Governor of *South Australia* under powers conferred on him by the Colonial Act, 21st Vict., No. 5, sec. 13, for regulating the sale and other disposal of waste lands belonging to the Crown, sealed with the public seal of the Province, but not enrolled or recorded in any court, are not in themselves Records; and though bad on the face of them, being for a larger quantity of land than allowed by that Act, cannot be annulled or quashed by a writ of *Scire facias*.

Such writ is a prerogative judicial writ, which must be founded on a Record, and cannot under the constitution of the Supreme Court in *South Australia* issue out of that Court.

The proper remedy for an unauthorized possession of lands of the Crown in the Colony is by an information in Chancery, or Writ of intrusion. [*The Queen v. Hughes*] 439

7. Action to recover the difference between the original price bid at a public auction, and the sum realized upon a re-sale, for the hull of a stranded vessel, sold by the Master and purchased by the Defendant, upon conditions of sale, which were appended to the memorandum of purchase, and signed

after the sale by the Defendant's agent on his behalf; which conditions differed materially from those appended to the catalogue of sale, and which were the conditions read out at the auction.

The Defendant paid the deposit upon the terms of the conditions of sale read at the auction, and took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, and was soon afterwards, by order of the Board of Health, destroyed as a nuisance. The Defendant having declined to complete the purchase, the vendor resumed possession of the vessel, and re-sold it at a loss.

The form of the action was by libel, according to the Roman-Dutch Law. The Defendant in his answer, among other defences, denied that he had purchased under the conditions appended to the memorandum of sale, and prayed the dismissal of the action with costs; and in reconvention, for payment of the amount of the deposit and damages he had sustained, to the amount of £1,000, for loss of profits and advantages from the vessel, her tackle and implements.

The judgment of the District Court was in favour of the Plaintiff, the Judge of that Court being of opinion that the Defendant purchased on the conditions of sale appended to the memorandum of purchase, and that, according to those conditions, the Plaintiff had

rightly resumed possession and re-sold the vessel. The Supreme Court on appeal reversed that judgment, and ordered judgment to be entered for the Defendant, being of opinion that the Plaintiff, having founded his claim upon an agreement which gave, among other things, a right of re-sale, with conditions different from those read at the auction, and having in consequence re-possessed himself of the vessel and re-sold her, had thereby deprived himself of the right to recover from the Defendant, and awarded the Defendant the damages claimed by his answer:—

Held by the Judicial Committee (1), that though the merits of the case were with the Plaintiff, neither the judgment of the District or Supreme Court could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction-room at the sale; and that the Plaintiff having sued upon a different contract, was not entitled to recover, and ought to have been nonsuited: and (2), that in the absence of any evidence of damage, the Defendant was not entitled to judgment for damages:—

Held further, that although the act of the Plaintiff in retaking the hull of the ship and selling her was wrongful, and entitled the Defendant to bring an action of trover, it did not amount to a rescission of the contract. [*Page v. Cowasjee Eduljee*] - - - 499

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To an action brought by the Commercial Bank of *Canada* against the *Great Western Railway Company of Canada* to recover the amount of advances made by the Bank to that Company for the completion of a Railway in the *United States*, connected in traffic with the *G. W. R. Co.*, the defence was, that the advances made by the Banking Company, though sanctioned by the shareholders, were foreign to the objects for which the *G. W. R. Co.* was incorporated; *ultra vires* the authority of the Directors of the Company and not binding upon the shareholders. At the trial it was agreed that, if the Plaintiffs were entitled to a verdict, the amount for which it should be entered should be ascertained by reference under the provisions of the Canadian Common Law Procedure Act (*Canada Consolidated Statutes*, c. 22, sec. 160). A verdict having been found for the Plaintiffs on the question of fact and law submitted by

the Judge to the jury, the terms of such reference were specially endorsed on the record, leave being given to the Defendants to move for a non-suit or a new trial on the grounds, first, of the verdict being contrary to the evidence; and secondly, misdirection of the Judge. By the terms of the reference, the Referee was to report upon the different classes of the account between the Banking Company and the *G. W. R. Co.*, and to draw up a statement of facts for the opinion of the Court. On a rule *nisi* for a new trial, the Court of Queen's Bench were unanimously in favour of the Defendants, and discharged the rule. Upon appeal from this decision to the Court of Error and appeal, that Court held that, though the verdict was not contrary to the evidence, yet there had been misdirection by the Judge in not directing the jury to find the extent of liability of the Defendants, and upon that ground granted a new trial. Held, on appeal, by the Judicial Committee, that though the *G. W. R. Co.* had exceeded the borrowing powers given by their original Act of incorporation, yet that sufficient borrowing powers having been given by subsequent Acts, and their exercise sanctioned by the shareholders, the borrowing was not *ultra vires* the authority of the Managers and Directors of the *G. W. R. Co.*, and that the grant of a new trial by the Court of Error and appeal on the ground

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1. Action *in rem* against ship, under Statute, 24th Vict., c. 10, for breach of contract. [*The Norway*] - - - - - 245
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the contract is made governs as to the nature of the obligation, and the interpretation of it, if the parties to the contract are (1) either subjects of a power there ruling, or (2), as temporary residents, owe that power a temporary allegiance. In either case they must be understood to submit to the law there prevailing, and to agree to its action on their contract. It is immaterial that such agreement so to be ruled by the *lex loci contractus* is not so expressed in terms; it is equally an agreement in fact, presume *de jure*, and a foreign Court interpreting or enforcing a contract so made on any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognized comity of nations.

A passenger in an English vessel belonging to an English company, from *Southampton* to *Mauritius*, via *Alexandria* and *Suez*, took and signed a ticket, in the body of which the engagement of the company was stated to be subject to the conditions and regulations endorsed thereon; among which was this clause—"the company do not hold themselves liable for damage to, or loss, or detention of passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the company in the Supreme Court at *Mauritius* for damages for the loss. That Court held that the contract was governed by the French law in force in *Mauritius*, and held

that the company were liable. Upon appeal held (reversing that judgment):—

First, that it was a contract to be interpreted by the law of *England*, the place where the contract was made.

Secondly, that (as neither the Carriers' Act, 11th *Geo.* IV. & 1 *Will.* IV., c. 68, or the Railway and Canal Act, 17th & 18th *Vict.*, c. 81, applied) the company, as carriers, at Common Law, had power to limit their Common Law liability by special agreement, and that the limitation imposed by the stipulations endorsed on the ticket with respect to any loss, exempted the company from responsibility for the loss of the baggage. [*The Peninsular and Oriental Company v. Shand*] - - - - - 272

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arrested for £800, the estimated amount of the damages and costs, and a bail Bond being given for that amount, the ship was released. By the decree of the Admiralty Court the damages and costs awarded exceeded the amount of the bail Bond. The Foreign owners having appealed to the Privy Council from that decree, the Respondents applied for further security, first, for the costs incurred in the Court below uncovered by the bail Bond; and, secondly, for the costs of the appeal. Held:—

First, that a Court of appeal could not entertain so much of the application as related to the costs incurred in the Court below; but—

Secondly, that as the 33rd section of Statute, 24th *Vict.*, c. 10, was not yet in operation, and the Appellants being Foreigners resident abroad, the rule requiring Foreigners appealing to find security for costs, was still in force, and security directed to be given by the Appellants for the costs of appeal. [*The Helene*] - - - - - 541

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The *St. A. & Q. Railway Company*, incorporated by a local Act, being also a land company, transferred by agreement, together with the undertaking, all its property, lands, rights, and appurtenances to the *N. B. & C. Railway Company*, also incorporated—such agreement

being confirmed by a private Act of the Imperial Parliament.

The *N. B. & C. Railway Company* having borrowed money, issued Debentures to secure the same; these were termed Mortgage Debentures, the principal and interest thereon being secured on the undertaking, and all moneys to arise from the sale of the lands of the company, all future calls on shareholders, and all tolls and sums of money which should become due, with the plant and rolling-stock, and with power of entry and possession of the same, in failure by the company of payment of principal and interest as therein specified, with a proviso that nothing therein contained should be held to limit the power of sale or appropriation by the company of any of the lands of the company, nor constitute a charge on the same.

These Bonds were not registered:—

Held, by the Judicial Committee, first, that such Debentures did not constitute a charge in the nature of an equitable mortgage on the lands of the company, so as to give the holders of such Debentures a right to restrain the sale of the lands by Judgment creditors of the company, or any title to the proceeds of the lands when sold.

Secondly, that as Judgment creditors under an execution take the precise interest, and no more, which the debtor possesses in the property seized, the sale being a sale by the law, and not by the com-

pany, such Judgment creditors took the lands, subject to any incumbrances, legal or equitable, that they were subject to in the hands of the company. [*Wickham v. The New Brunswick and Canada Railway Company*] - 416

#### DEBTOR AND CREDITOR.

See "COLONIAL LAW," 4.

#### DEBTS.

Liability of new firm for debts of old firm.

See "COLONIAL LAW," 4.

#### DECISIONS OBSERVED UPON, OVERRULED, &c.

The case of *The Queen v. Clarke* (7 Moore's P. C. Cases, 77), commented on and explained. [*The Queen v. Hughes*] - - - 439

#### DEFINITIVE DECREE.

See "APPEAL," 1.

#### DEPRIVATION,

Sentence of, on a Colonial Bishop, for unsound doctrine.

See "PREROGATIVE OF THE CROWN," 1.

#### ECCLESIASTICAL LAW.

1. Consolidated Chapelries and district Churches, though differing in origin, are, when once formed, precisely similar in character, and within the meaning of the Statute, 19th & 20th Vict., c. 104, s. 14.  
The voluntary relinquishment of fees required by the 12 section of the Statute, 19th & 20th Vict., c.

104, may be made without the execution of any written instrument. [*Jones v. Gough*] - - 1

2. Prerogative of the Crown to create by Letters Patent Bishoprics in the Cape of Good Hope and elsewhere there is a Legislative Assembly. [*In re the Lord Bishop of Natal*] - - - - - 1

#### EQUITABLE LIEN.

See "LIEN."

#### EQUITY.

Bill to enforce lien on sugars, from of Bill. [*Dean v. Brynes*] - - 1

See "LIEN."

#### EQUITABLE MORTGAGE

See "DEBENTURE BOND."

#### EVIDENCE

1. As proceedings under the laws for the suppression of the slave trade are penal, the offence charged being a criminal offence, the onus probandi is upon the Seizors to establish that the law has been infringed.  
Offences against the Slave Trade Act may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded.

Where articles of merchandize, employed for the purpose of the slave trade, and capable of being employed for lawful commerce, are found on board a vessel seized on suspicion of being so employed it is not sufficient to consider

merely what are the cargoes of the vessel accused of being implicated in the unlawful trade, but all the circumstances of each particular case, and more especially the locality in which the vessel may be found, must be taken into consideration. [*The Laura*] - - - 181

2. The new rules made, pursuant to the Statutes, 3rd & 4th Vict., c. 65 & 66, and the 17th & 18th Vict., c. 78, do not restrain the Judge of the Admiralty Court from admitting, in his discretion, fresh evidence, when the case comes before him upon objections to the report of the Registrar and Merchants upon a reference to them to ascertain the amount of damage. [*The Flying Fish*] - - - - - 77

#### EXTENSION OF TERM OF LETTERS PATENT.

See "PATENT."

#### FACTOR,

Advances by, on goods, implied power of sale. [*De Comas v. Prost*] 158

#### FEES.

The voluntary relinquishment of fees for offices performed by a clergyman, required by Statute, 19th & 20th Vict., c. 104, may be made without the execution of any written instrument. [*Jones v. Gough*] 1

#### FIERI FACIAS.

According to the law of *New Brunswick*, freehold lands of debtor, if the personal estate is exhausted,

may be sold under a *fi. fa.* [*Wickham v. The New Brunswick and Canada Railway Company*] [416]

#### FIRE.

Liability of Master by Code Civil in force in *Mauritius*, for negligence of servant. [*Séréndat v. Saisse*] 534  
See "FOREIGN LAW," 2.

#### FOREIGNER.

Resident abroad, security for costs of appeal. [*The Helens*] - - 240  
See "Costs," 2.

#### FOREIGN LAW.

1. According to the law prevailing in *Jersey*, a sale by an expectant heir of his expectancy, in the absence of fraud or inadequacy of consideration, cannot be impeached after the lapse of a year and a day from the time of opening the succession.  
*Semble.* A sale by an expectant heir to his brothers is not by that law necessarily *contra bonos mores*.  
Parties wronged by unconscionable bargains are, by the *Jersey* law of limitation, allowed a period of thirty years, computed from the date of sale, to impeach the transaction, on the ground of inadequacy of consideration, and forty years from the death of the parents; but in order to justify the interference of a Court, evidence must be satisfactorily given that less than one-half of the value has been given for the property purchased.



A *Mandat* by the *Jersey* law is an authority from a principal to his mandatories to manage the property of the former, and on his behalf, as Agents.

*G.*, a native of *Jersey*, being in embarrassed circumstances, by a deed made in *March*, 1835, conveyed and transferred his expectant share in the heritable and movable estate which would accrue to him on his parents' death, to his four brothers, in consideration of an annuity. The deed contained a clause binding the parties that they would neither act nor authorize any one to act against the provisions contained in the deed on pain of perjury. By a voluntary deed, executed in *July*, in the same year, by the four brothers, to which *G.* was not a party, it was agreed that the share of *G.* which should accrue at the time of the opening of the succession of his parents, after deducting the amount of his debts and of the annuity, should be paid to *G.*, if unmarried, but in the event of his marriage, then that the share should be applied for the benefit of *G.*'s wife and children. Upon appeal, held by the Judicial Committee, reversing the judgment of the Royal Court of *Jersey*.

First, that the deed of *March*, 1835, was an absolute purchase of *G.*'s expectant succession, and that the settlement of *July*, 1835, was a voluntary deed by his four brothers for *G.*'s benefit, or in the event of his marriage, for his family's

benefit, and if he had no family, for themselves ultimately, and did not constitute the four brothers' mandatories for *G.*

Held further, that the oath taken by parties to a contract passed before the Bailiff of the Royal Court, to abide by it under pain of perjury, is to be considered to contain a tacit reservation of just grounds of complaint.

*Semble.* There is nothing by the *Jersey* law to prevent the creation of trusts *inter vivos*. [*Godfray v. Godfray*] - - - - - 316

2. By Art. 1,384 of the *Code Civil* (the law prevailing in *Mauritius*.) it is provided that "*Les Maîtres et les Commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés* :—

Held, that in order to make the "*Commettant*" responsible for damage occasioned by the negligence of the "*Préposé*," it is necessary to establish that the "*Préposé*" was acting "*sous les ordres, sous la directions et la surveillance du Commettant*."

"*Préposé*," in Art. 1,384, means a person who stands in the same relation to the "*Commettant*," as "*Domestique*" does to "*Maître*" — namely, a person whom the "*Commettant*" has instructed to perform certain things on his behalf.

A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood, at a job price, to be

paid to their gangs. Through the negligence of the persons employed, the sparks of a fire kindled on *A.*'s land, set fire to and burnt down a house in the immediate neighbourhood belonging to *B.* It was proved in evidence that *A.* interfered with the work, and directed the Indians where to work :—

Held, affirming the judgment of the Supreme Court at *Mauritius*, that *A.* was the "*Committant*" and the labourers "*Préposés*," within the meaning of the Art. 1,384 of the *Code Civil*, and that as the fire was occasioned by the men employed by *A.*, he was responsible for their negligence, and liable to *B.* for the damage sustained by the fire. [*Sérendat v. Saïsse*] - 534  
See "PREROGATIVE OF THE CROWN," 2.

#### FREIGHT,

Excessive demand for. Right to deduct from lump-freight for goods not delivered. [*The Norway*] 245  
See "SHIP AND SHIPPING," 5.

#### FRENCH LAW.

See "FOREIGN LAW," 2.

#### FRESH EVIDENCE

Admitted under the new Admiralty rules, made pursuant to the Statutes, 3rd & 4th *Vict.*, c. 65 & 66, and the 17th & 18th *Vict.*, c. 78. [*The Flying Fish*] - - - 77

See "EVIDENCE," 2.

#### GENERAL AVERAGE.

See "SHIP AND SHIPPING," 5.

#### INJUNCTION.

See "MORTGAGE."

#### INSOLVENCY.

See "COLONIAL LAW," 4.

"LIEN."

#### INSURANCE

To be charged in estimating damages for non-delivery of cargo. [*The Norway*] - - - - 245

See "SHIP AND SHIPPING," 5.

#### INTEREST,

For wrongfully withholding cargo.

See "SHIP AND SHIPPING," 5.

#### INTERPRETATION.

Rule for interpreting contracts made in one country to be performed in another country. [*The Peninsular & Oriental Company v. Shand*] - - - - - 272

See "CONTRACT, 2."

#### JERSEY.

See "FOREIGN LAW," 1.

"PREROGATIVE OF THE CROWN," 2.

#### JETTISON.

See "SHIP AND SHIPPING," 5.

#### JOINT DEBT.

See "COLONIAL LAW," 4.

#### JUDGMENT CREDITORS.

See "DEBENTURE BOND."

#### JURATS,

Election of.

See "PREROGATIVE OF THE CROWN," 2.

## JURISDICTION

Of Vice-Admiralty Court at *Antigua*,  
under Statute, 2nd & 3rd Vict.,  
c. 73, s. 1, to adjudicate for a  
violation of the Slave Trade Acts.  
[*The Laura*] - - - - - 181

See "SLAVE TRADE."

## LEASES,

Under *South Australian Colonial*  
Act, 21st Vict., No. 5, sec. 13.

See "COLONIAL LAW," 6.

## LEAVE TO APPEAL.

See "PRACTICE," 4, 6, 7, 8.

## LEGISLATIVE ASSEMBLY.

Prerogative of the Crown to create  
by Letters Patent Bishoprics in  
the *Cape of Good Hope* and *Natal*,  
where there is a Legislative As-  
sembly. [*In re the Lord Bishop*  
*of Natal*] - - - - - 116

See "PREROGATIVE OF THE CROWN," 1.

## LETTERS PATENT.

See "PATENT."

## LEX LOCI CONTRACTUS.

See "CONTRACT," 2.

## LEX SOLUTIONIS.

See "CONTRACT," 2.

## LICENSE.

1. To Pilot.

"See "SHIP AND SHIPPING," 1.

2. To occupy waste Crown lands in  
*Victoria*.

See "COLONIAL LAW," 3.

3. To work Patent.

See "PATENT."

## LIEN.

A verbal agreement was entered into  
between *D.*, a broker and commis-  
sion agent at *Sydney*, and *S.*, who  
speculated in sugars, in conse-  
quence of which two sums were  
advanced by *D.* to *S.* at different  
periods, the first for £3,000. and  
the second for £7,999 15s. 3d., *S.*  
undertaking to place in the hands  
of *D.*, for sale, certain sugars to  
be imported from *Mauritius* and  
*Batavia*, *D.* taking the profits of  
the commission arising from the  
sale, and repaying his advances,  
with interest, out of the proceeds  
of the sale. Of the moneys thus  
borrowed, the sum of £3,000, with  
other moneys, was remitted by *S.*  
to *H. & Co.*, his agents at *Batavia*,  
for the purchase of sugars. From  
the state of the market *H. & Co.*  
could not then purchase any sugars  
on *S.*'s account, who in the interim  
became insolvent, and executed a  
deed assigning his property to  
Trustees for the benefit of his  
creditors. After *S.*'s insolvency  
*H. & Co.* purchased *Mauritius*  
sugars with the moneys sent by *S.*  
to whom the same was consigned  
and sold by the Trustees. The  
exact time when *H. & Co.* heard  
of *S.*'s insolvency did not appear,  
but they afterwards purchased  
*Batavian* sugars, and having heard

of *S.*'s insolvency, consigned the sugars to *S.*, as agent of the Trustees. *S.* had deposited with *D.* promissory notes and acceptances of *J.* and *J. & Co.* by way of security for *D.*'s advances to him. *J.* and *C.* were interested in the adventure of *S.* After *S.*'s insolvency *J. & Co.* also became insolvent, and *D.* received from their estate the sum of £6,083 12s., on account of their Bills, and applied £3,000 to the payment of the first advance, and the balance towards the other sum of £7,999 15s. 3d. *D.* claimed a lien on the sugars in respect of the sum of £4,916 11s. 1d., the remaining part of the sum of £7,999 15s. 3d. Held, affirming the decree of the Court below:—

First, that it was no part of the agreement that *S.* should invest the moneys lent him by *D.* in any particular way, and having assigned his property to Trustees for the benefit of his creditors before the purchase by *H. & Co.*, the sugars consigned were for the benefit of the Trustees, and that *D.* had no lien on the sugars.

Second, that *S.*'s Trustees allowing *H. & Co.* to purchase *Bata-vian* sugars on their account, did not affect the Trustees with any equity in favour of *D.* under his agreement with *S.* [*Dean v. Byrnes*] - - - - - 92

#### LIMITATION

Of actions (1), to avoid sale by expectant heir of his expectancy in

his parents' succession (2) to annul sales generally, or impeach bargains for inadequate consideration. [*Godfray v. Godfray* - - - 316

*See* "FOREIGN LAW," 1.

#### MANDAT,

Definition of.

*See* "FOREIGN LAW," 1.

#### MASTER AND SERVANT.

*See* "FOREIGN LAW," 2.

#### MAURITIUS,

Law of.

*See* "FOREIGN LAW," 2.

#### MORTGAGE.

The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such re-conveyance upon such payment being made.

Where, therefore, a mortgagee having, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities:—

Held, that he was not entitled so to sever the debt from the security, and an injunction granted against his proceeding at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor, to redeem and to settle the equities of the parties sustained. [*Jones v. Walker*] - 397

#### MUNICIPALITIES

(Act 22nd Vict., No. 13, sec. 1 and 2),  
Construction of.

See "COLONIAL LAW," 2.

#### NATIONAL CHARACTER.

See "SLAVE TRADE."

#### NEGLIGENCE.

A suit *in rem* instituted in the Admiralty Court under the Statute 24th Vict., c. 10, sec. 6, against a Foreign vessel, to recover damages to the cargo by negligence. [*The Helene*] - - - - - 240

See "FOREIGN LAW," 2.

"SHIP AND SHIPPING," 5.

#### NEGOTIABLE INSTRUMENT.

A Bill of lading for delivery of goods to order or assigns, passes by endorsement and delivery. [*The Marie Joseph*] - - - - - 556

#### NEW BRUNSWICK.

See "COLONIAL LAW," 5.

"DEBENTURE BOND."

#### NEW SOUTH WALES.

See "COLONIAL LAW," 2.

"MORTGAGE."

#### NOVITER AD NOTITIAM.

See "PLEADING," 2.

#### OATH,

Effect of, by the law of *Jersey* when taken by parties to a contract passed before the Bailiff of the Royal Court. [*Godfray v. Godfray*] 316

See "FOREIGN LAW," 1.

#### OCCUPATION

Of waste lands in *Victoria* under licenses from the Crown. Effect of title as against the Crown. [*The Queen v. Dallimore*] - - - 347

#### ONUS PROBANDI.

See "EVIDENCE," 1.

#### OWNERSHIP.

An ownership which was at the time perfect in law, though voidable as to part, namely, the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but is in the interim protected by the interposition of a *bond fide* purchaser for valuable consideration. [*The Marie Joseph*] - - - - - 556

#### PARTNERSHIP.

Liability of new firm for debts of old firm.

See "COLONIAL LAW," 4.

PASSENGER.

The words, "persons belonging to such ship" in the 458th section of the Merchant Shipping Act, 1854, include passengers on board the ship, as well as the master and the crew, and who in respect to remuneration for life salvage stand on the same footing as the Master and crew. [*The Fusilier*] - - 51  
See "SHIP AND SHIPPING," 3.

PATENT.

To entitle a Patentee to a prolongation of the term of Letters Patent, he must satisfactorily establish the amount of his profits.

A Patentee did not manufacture or sell the patented article (ship anchors), but granted licenses to iron-smith, to manufacture, from whom he received royalties. On an application by him for an extension of the term of the Letters Patent, on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the Patent being unsatisfactory, and no accounts given of the profits derived by the Licensees, a prolongation of the Letters Patent was refused, first: as the Patentee's accounts were unsatisfactory, and secondly, from the Patentee having so dealt with his patent rights as to deprive him of the power of showing the amount of profit derived from the working of the patent.

Licensees stand, with respect to the profits, in the same position as an Assignee of the Patentee. [*In re Trotman's Patent*] - - - 488

PERILS OF SEA.

See "SHIP AND SHIPPING," 5.

PILOT.

See "SHIP AND SHIPPING," 1.

PLEADING.

1. A Bill was filed by *D.* praying a declaration that he had a lien on the sugars consigned from *Batavia*, but the Bill did not mention the *Mauritius* sugars. Held, that as *D.* had so framed his Bill, he was precluded from afterwards insisting on any new claim by way of lien on the *Mauritius* sugars. [*Dean v. Byrnes.*] - - - 92
2. An allegation pleading facts, *noviter ad notitiam perventa*, admitted by the appellate Court, and evidence taken *viva voce* thereon. [*The Laura.*] - - - 181  
See "COLONIAL LAW," 7.

PRACTICE.

1. A party is not bound to appeal from an Interlocutory decree, though he might by so doing have raised the whole question at issue on the appeal from the definitive sentence. [*Jones v. Gough*] - - - 1
2. The appellate Court will not disturb an award of salvage by the Court below, on the ground of that Court having awarded too large a sum, unless they are satisfied, beyond all doubt, that the Judge has made an exorbitant estimate of the salvage services. [*The Fusilier*] - - - 51
3. An allegation pleading facts, *noviter ad notitiam perventa*, admitted

- by the appellate Court, and evidence taken *viva voce* thereon. [*The Laura*] - - - - - 181
4. Where a question arose upon the construction of a Proclamation made under a Colonial Act, respecting the formation of a Municipality, affecting the Government of the Colony, and the appeal sought only a construction of the Proclamation, leave to appeal was granted, although the time limited for appealing had expired; but, as the appeal was only admitted to determine such construction, terms were imposed upon the Petitioners: first, that it was to be without prejudice to a judgment already existing in the Respondent's favour arising out of the same transaction; and, secondly, that a security Bond should be executed to indemnify the Respondent (in any event in which the appeal was determined) his expenses and costs of appeal. [*Graham v. Berry*] - - - - - 207
5. On appeal by Foreign owners of a ship, the bail Bond given in the Court below not covering the damages, further security for costs of appeal ordered. [*The Helene*] [240]
6. Sec. 23 of the 26th & 27th *Vict.*, c. 24, which limits the time for appealing from the Vice-Admiralty Courts abroad to six months, vests, by the same section, a discretion in the Judicial Committee to admit an appeal notwithstanding six months have elapsed. Circumstances shewing that there was no wilful laches in not lodging a petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question, held sufficient for the exercise of the discretion vested in the Judicial Committee to admit an appeal under that section, upon payment of the costs of the application, and giving security for further costs. [*Casanova v. The Queen*] [484]
7. Several actions, in the nature of Petitions of Right, were brought against the Crown in *Victoria*, under the Colonial Act, 28th *Vict.*, No. 241, and judgments obtained against the Crown; but the Supreme Court of that Colony refused leave to appeal to *England*, in some cases, because the amount recovered was under £500, the appealable value prescribed by the Order in Council of the 9th of *June*, 1860, and in other cases, except upon terms of the Attorney-General in the Colony paying the amount of the verdicts with costs. In giving leave to appeal, upon special petition for that purpose, the Judicial Committee refused to sanction the terms imposed by the Supreme Court on the Attorney-General of finding security for costs of the appeals, and admitted the appeals without security being given. Appeals directed to be consolidated

and heard as one case. [*In re the Attorney-General of Victoria*]

[527]

8. By an Order, of the Supreme Court of *Victoria* leave to appeal to Her Majesty in Council, pursuant to the Colonial Act, 15th *Vict.*, c. 10, was allowed on condition of the Appellant giving security within three months for costs of appeal. The Appellant at first offered to deposit money to the amount of the security required, but afterwards a security Bond was approved by the Master of the Court, and without objection by the Defendants, filed as of record; but in consequence of objections afterwards taken by the Defendants' Solicitors to the competency of the proposed sureties, the Bond was not filed within three months. Upon a motion by the Defendants, to set aside the leave to appeal upon that ground, the Supreme Court made an order revoking the leave given.

In such circumstances their Lordships, upon petition, gave special leave to appeal, on security being given for costs in *England*, with liberty for the Petitioners to apply to the Court at *Victoria* to cancel the security Bond. [*Webster v. Power*] - - - - - 531

#### PREROGATIVE OF THE CROWN.

1. The Queen, in exercise of her authority as Sovereign and head of the Established Church, created by Letters Patent a Metropolitan

and two Suffragan Bishops, with Episcopal jurisdiction and authority in the Colony of the *Cape of Good Hope*, which Colony had at the time a Legislative Council and House of Assembly. By the Letters Patent the Suffragan Bishops were declared subject and subordinate to the Metropolitan, in the same manner as a Bishop of any See within the Province of *Canterbury* was under the authority of the Archbishop thereof; the Colonial Metropolitan Bishop being subject to the general superintendence and revision of the Archbishop, with an ultimate appeal from any sentence pronounced by such Metropolitan to the Archbishop, or his successors, who should finally decide and determine the same. These Letters Patent were not made in pursuance of any Order in Council, or of a Statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the *Cape of Good Hope*, or of the Legislative Council of *Natal*.

Under these Letters Patent the Suffragan Bishop of *Natal* was consecrated and took the oath of canonical obedience to his Metropolitan. In the year 1863, certain charges of heresy and false doctrine having been preferred against the Bishop of *Natal*, before his Metropolitan, that Bishop sentenced the Bishop of *Natal* to be deposed from his office, and to be prohibited from the exercise of any divine office within any part of



the Metropolitan Province of the Colony. Upon appeal to Her Majesty in Council, held:—

First, that as there was an independent Legislative Assembly in the Colony, there was no power in the Crown, by virtue of its prerogative (without the provisions of a Statute of the Imperial Parliament) to establish a Metropolitan See or Province, or to create an Ecclesiastical Corporation whose *status*, rights, and authority the Colony could be required to recognize.

Secondly, that, even if the Letters Patent did create between the Metropolitan and Suffragan Bishop an ecclesiastical *status*, yet the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over a Suffragan Bishop, or over any other person.

Thirdly, that the oath of canonical obedience taken by the Suffragan Bishop to his Metropolitan, did not confer any jurisdiction on the Metropolitan Bishop, by which a sentence of deprivation could be supported, nor was it legally competent to the parties to give or receive such a voluntary or consensual jurisdiction; and,

Lastly, that the proposed ultimate appellate jurisdiction given to the Archbishop of *Canterbury* was equally invalid.

It is the undoubted prerogative of the Crown to receive appeals in all Colonial causes, and by the 25th *Hen. VIII.*, c. 19 (by which the mode of appeal to the Crown in

ecclesiastical causes is directed), it is by the 4th section enacted that, "for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery," an enactment which gave rise to the Commission of Delegates, which was abolished by the 2nd & 3rd *Will. IV.*, c. 92, and for which the Judicial Committee of the Privy Council is by the 3rd & 4th *Will. IV.*, c. 41, now substituted.

In a dispute in one of Her Majesty's colonies, between two independent Prelates, which, previous to the 25th *Hen. VIII.*, c. 19, would have been referred to the Pope, Her Majesty has appellate jurisdiction, and can exercise the same by referring the matter, under the 3rd & 4th *Will. IV.*, c. 41, for the advice of the Judicial Committee of the Privy Council.

*Semble.* Though the Crown may by its prerogative establish Courts to proceed according to Common Law, yet it cannot create any new Court to administer any other law. [*In re the Lord Bishop of Natal.*] 115

2. By the constitution and law of the Island of *Jersey*, the Royal Court is composed of a Bailiff and twelve *Jurats*, and upon the voluntary resignation of a *Jurat*, it is the prerogative of the Crown to permit such resignation, and to authorize a new election to fill up the vacancy so occasioned.

*Secus*, on a vacancy occasioned by the death of a *Jurat*, when the Royal Court have power alone to order a new election.

The States of *Jersey* passed two *Actes* accepting the resignation of two *Jurats*, on the ground of their length of service and inability to continue to perform the duties of their office. These *Actes* were objected to by certain landowners and others in the Island, who petitioned the Crown against confirming the same, and to suspend the filling up of those offices until a reform, long in contemplation, of the Royal Court had taken place; but, although it was considered by the Lords of the Committee that a complete change in the constitution of the Royal Court was necessary, yet, as the suspension of new elections of *Jurats* would not affect any improvements in the constitution of that Court, Her Majesty was advised to permit such resignations, coupled with directions that the same privileges and distinctions that the retiring *Jurats* had enjoyed as *Jurats* should continue to them during their lives, and ordering new elections to supply the place of such vacancies. [*In re the Jersey Jurats*] - 456

#### PRINCIPAL AND AGENT.

Mere advances made by a Factor, whether at the time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances

are accompanied by an agreement that the authority shall not be revocable.

Whether such an agreement has been made, or properly inferred, is a question upon the evidence for the jury.

So held in an action for damages for an alleged improper sale by the Defendants of certain sugars placed in their hands by the Plaintiff.

The Judge directed the jury that, by the mere relationship of Factor, the Factor did not, by making advances, acquire any right in derogation of the rights of his principal to give directions as to the time and manner of sale, and that any such right on the part of the Factor must be made out by an agreement which might be inferred from the evidence, or might be implied by the proof of usage. Held, that there was no misdirection. [*De Comas v. Prost*] - - - 158

#### PROFITS.

See "PATENT."

#### PROLONGATION

Of term of Letters Patent.

See "PATENT."

#### PROOF OF DEBTS

Admitted against joint estate by creditor holding security on separate estate. [*Rolph and the Bank of Australasia v. Flower*] - - 365

#### RAILWAY AND LAND COMPANIES.

See "COMPANY."

"DEBENTURE BOND."

## RECONVENTION.

*See* "COLONIAL LAW," 7.

## RECORD,

Court of.

*See* "COLONIAL LAW," 6.

## REFERENCE

To Register and Merchants to ascertain the amount of damage. Fresh evidence admitted on objections to report of. [*The Flying Fish*] 77

*See* "EVIDENCE," 2.

## REGISTRY,

Effect of, provisional certificate of registry from a British Consul of ship as British. [*The Laura*] 181

*See* "SLAVE TRADE."

## RE-SALE

By Vendor.

*See* "COLONIAL LAW," 7.

"VENDOR AND PURCHASER."

## ROMAN-DUTCH LAW.

*See* "COLONIAL LAW," 7.

## SAILING REGULATIONS.

*See* "SHIP AND SHIPPING," 2.

## SALE.

1. By Factor who made advances on goods.

*See* "PRINCIPAL AND AGENT."

2. By expectant heir of his expectancy in his parents' succession.

*See* "FOREIGN LAW," 1.

3. Of Crown lands in the Colonies.

*See* "COLONIAL LAW," 8.

## SALVAGE.

1. Salvage remuneration exceeding value of salvage vessels. [*The Fusilier*] - - - - - 51
2. Salvage of life, liability of owners of cargo to contribute to salvage. [*The Fusilier*] - - - - - 51

## SCIRE FACIAS

To annual grant.

*See* "COLONIAL LAW," 6.

## SECURITY FOR COSTS OF APPEAL.

*See* "COSTS."

## SEVERANCE

Of securities for debt.

*See* "MORTGAGE."

## SHAREHOLDERS,

Liability of.

*See* "COMPANY."

## SHIP AND SHIPPING.

1. By the 374th section of the Merchant Shipping Act, 17th & 18th Vict., c. 104, it is provided that no license granted by the Trinity House shall continue "in force beyond the 31st day of *January* next ensuing the date of such license; but that the same may, upon the application of the Pilot holding such license, be renewed on such 31st day of *January* in every year, or any subsequent day." Held by the Judicial Committee, affirming the decree of the Court below, that a Pilot's license re-

newed on the 20th of *January* was within the intention of that provision, so as to be in operation and effect on the 6th of *May* following.

[*The Beta*] - - - - - 23

2. Collision in the Atlantic Ocean at midnight between *G.*, a steamship of unusual size and tonnage, and *J.*, a sailing-vessel.

*G.* going at a rate of between twelve and thirteen knots an hour. *J.* sailing close-hauled on the "port tack," and being two or three miles distant, when she first sighted *G.*, instead of keeping her course, ported her helm. Held—First, that under the 18th Art. of the Sailing Regulations, issued in pursuance of the Merchant Shipping Act Amendment Act, 1862, it was the duty of *J.* to have kept her course without alteration, unless, as provided by Art. 19, the danger of collision was so imminent when *G.* was sighted as to render a departure from the 18th Art. necessary to avoid danger, and that she was, therefore, partly to blame for the collision, having contributed to it by porting; and,

Secondly, that *G.* was also to blame, as, even if *J.* had kept her course, from the rate of speed *G.* was advancing, a collision was inevitable, it being, under Art. 15 of the Sailing Regulations, the duty of a steamer meeting a sailing-vessel to reverse her engines and slacken her speed in sufficient time, so as, having regard to the state of the weather, as far as possible, to avoid a collision. [*The Great Eastern*] 31

3. The words "persons belonging to such ship" in the 458th section of the Merchant Shipping Act, 1854, include passengers on board the ship, as well as the Master and crew; and who, in respect to remuneration for life salvage, stand on the same footing as the Master and crew.

The owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage.

The accident of the amount of salvage awarded exceeding the value of the salvage vessels is wholly immaterial, as the value of such vessels is not an element to detract from the value of the salvage service. [*The Fusilier*] - - - - - 51

4. A collision took place in the Channel by Her Majesty's Gunboat *F. F.* running into a sailing-vessel, and in consequence of the injury she received, the Master ran the vessel ashore. Though assistance was repeatedly offered, and the Master was informed that the vessel could be got off, he made no effort to save the vessel, but refused all assistance, and the vessel afterwards stranded and broke up. Held by the Judicial Committee, that as the vessel was not in such a state that all attempts to save her were hopeless, the Master displayed such a want of

nautical skill and neglect of duty, that the *F. F.* was responsible only for the damage directly occasioned by the collision, and not for that which subsequently occurred after the refusal of the assistance offered. Held further, that it was unnecessary to show that such subsequent damage arose from gross nautical ignorance on the part of the Master, as it is sufficient that there was a want of ordinary nautical skill and resolution. [*The Flying Fish*]

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5. By a Charter-party, it was stipulated by the Charterer and the Master, that the vessel should load an outward cargo, proceed to *Rangoon*, a river port in *India*, and there load a homeward cargo. The Master guaranteed the vessel to carry 3,000 tons dead weight upon a draught of twenty-six feet; to return to one of the ports mentioned in the Charter-party at the Charterer's option, and there to discharge the cargo. Freight was to be paid in a lump-sum, part in advance before sailing from *England*, part on the voyage, and on arrival at return of port of delivery, and the remainder on the final delivery of the cargo.

The vessel loaded at *Rangoon* a quantity of rice, as much as she could carry down the river *Irrawaddy*, but which amounted to less than 3,000 tons dead weight. In consequence of the negligence of a pilot, taken on board by the Master, the vessel grounded in that river. She was got off, but after-

wards at sea sprang a leak, and to save the vessel, part of the cargo was thrown overboard, and other damaged portions were sold at *Mauritius*, a port she stopped at to repair on her homeward voyage, where the remaining portion was re-shipped. When the vessel arrived at *Liverpool*, a port of discharge mentioned in the Charter-party, the Master claimed a sum of money as lump-freight, larger than was really due, as well as a sum for general average contribution, and without going the length of refusing to deliver any, he insisted upon keeping in his possession a part of the cargo to cover his demand for freight he considered due. A tender was made by the Assignee of the Bill of lading of the amount considered by him due, and he undertook to give security for the remainder. The Master refused this offer, and took the vessel into a dock, other than that named by the Charterer, and the cargo of rice was unladen without assortment, as was customary. In these circumstances the Assignee of the Bill of lading brought a suit *in rem*, pursuant to the 24th Vict., c. 10, in the Admiralty Court, against the vessel for damages in respect of breaches of contract and duty. Held:—

First, that as both parties contemplated that a cargo might be laden in a river, the guarantee that the vessel would carry 3,000 tons dead weight, in a draught of twenty-six feet, applied alike to fresh and salt

water, and that there was a breach of contract.

Second, that with respect to the cargo jettisoned, and the damaged rice sold in *Mauritius* in the absence of the Plaintiff proving affirmatively the negligence of the Pilot, or the want of prudence on the part of the Master, that there ought to be no deduction from the lump-freight on account of non-delivery, as it arose from the perils of the sea.

Third, that the demand by the Master of a larger sum than was due, and the refusal by him to deliver the cargo, was so made that it amounted to an announcement by him that it would be useless to tender any smaller sum, for if tendered it would be refused, and that such refusal constituted a constructive waiver of any tender; and further, that a peremptory claim for general average came within the rule as to dispensation of tender.

Fourth, that the Master was not liable for damages for the non-assortment of the cargo, as the Assignee could, by complying with the terms of the Statute 25th & 26th *Vict.*, c. 63, sec. 67, have landed the rice himself.

Held further, that in estimating the damages for non-delivery of the cargo, the Assignee was entitled, under the provisions of the Admiralty Act, 1861, to be indemnified for the loss of interest for the wrongful withholding of the cargo, and for insurance and interest.

The holder of a Bill of lading, com-

prising the whole cargo, has by custom a right to deduct "Address commission" from the freight. [*The Norway*] - - - - - 245

See "BILL OF LADING."

### SLAVE TRADE.

The Appellant, a native of the *Ionian Islands*, purchased an American ship, and, upon a declaration that he was a British subject, obtained from the British Consul at *Cuba* a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the Court below, on the ground of the national character of the owner of the ship and cargo. Held:—

First, that the registry, flag, and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently that the registry of the ship was void; and,

Secondly, that even if he could have established that the registry was void, and the ship not entitled to claim the protection of any flag or nation, yet that the ship was by the Statute 2nd & 3rd *Vict.*, c. 73, liable to be adjudicated upon by a Vice-Admiralty Court for a violation of the Slave Trade Acts.

A decree of the Vice-Admiralty Court at *Antigua*, condemning a

ship and cargo for infraction of the Slave Trade Acts, reversed, and restitution decreed, with damages and costs.

As proceedings under the laws for the suppression of the Slave Trade are penal, the offence charged being a criminal offence, the *onus probandi* is upon the Seizors to establish that the law has been infringed.

Offences against the Slave Trade Acts may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded.

Where articles of merchandize usually employed for the purpose of the Slave Trade, but capable of being employed for lawful commerce, are found on board a vessel seized on suspicion of being so employed, it is not sufficient to consider merely of what the cargo of the vessel accused of being implicated in the unlawful trade consists, but all the circumstances of the case, and more especially the locality in which the vessel may be found, must be taken into consideration. [*The Laura*] 181

#### SPECIAL APPEAL.

See "APPEAL," 2, 3, 5, 6, 7.

#### SUCCESSION.

See "FOREIGN LAW," 1.

#### SUIT IN REM.

See "SHIP AND SHIPPING," 5.

#### STOPPAGE IN TRANSITU.

See "BILL OF LADING," 2.

#### TENDER.

A demand by the Master of a ship of a larger sum than was due for freight, and the refusal by him to deliver the cargo so made that it amounted to an announcement by him that it would be useless to tender any smaller sum, for if tendered it would be refused, it was held that such refusal constituted a constructive waiver of any tender; and further, that a peremptory claim for general average came within the rule as to dispensation of tender. [*The Norway*]

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See "SHIP AND SHIPPING," 5.

#### TIME

For appealing expired.

See "PRACTICE," 4, 6.

#### TITLE

By occupation of Licenses under the Crown of waste lands in *Australia*.

See "COLONIAL LAW," 3.

#### TRUSTS.

There is nothing by the *Jersey* laws to prevent the creation of trusts *inter vivos*. [*Godfray v. Godfray*]

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#### ULTRA VIRES.

See "COMPANY."

**UNDERTAKING.**

Construction of word.

*See* "DEBENTURE BOND."**USAGE.***See* "PRINCIPAL AND AGENT."**VENDOR AND PURCHASER.**

If before the actual delivery, the vendor re-sells the property, while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may still be due.

The rule applies where there has been a delivery, and the vendor afterwards takes the property out

of the possession of the purchaser and re-sells it. [*Page v. Cowasjee Eduljee*] - - - - - 499

*See* "COLONIAL LAW," 7.**VICTORIA,**

Colony of.

## 1. Sale of Crown lands.

*See* "CROWN LANDS."

## 2. Insolvent laws of.

*See* "COLONIAL LAW," 4.**WASTE LANDS**

In *Australia*, title of licensees by occupation.

*See* "COLONIAL LAW," 8.**WRIT OF INTRUSION.***See* "COLONIAL LAW," 6.











